No. 04-473

Title:	Gil Garcetti, et al., Petitioners v. Richard Ceballos
Docketed:	October 7, 2004
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(02-55418)
Decision Date:	March 22, 2004
Rehearing Denied:	July 6, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 1 2004	Petition for a writ of certiorari filed. (Response due November 8, 2004)
Nov 5 2004	Waiver of right of respondent Richard Ceballos to respond filed.
Nov 8 2004	Motion for leave to file amicus brief filed by California State Association of Counties.
Nov 17 2004	DISTRIBUTED for Conference of December 3, 2004.
Nov 26 2004	Response Requested . (Due December 27, 2004)
Dec 6 2004	Order extending time to file response to petition to and including January 26, 2005.
Jan 25 2005	Brief of respondent Richard Ceballos in opposition filed.
Feb 3 2005	Reply of petitioners Gil Garcetti, et al. filed.
Feb 9 2005	DISTRIBUTED for Conference of February 25, 2005.
Feb 28 2005	Motion for leave to file amicus brief filed by California State Association of Counties GRANTED.
Feb 28 2005	Petition GRANTED.
Mar 10 2005	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including May 9, 2005.
Apr 29 2005	Further extension of time to file the joint appendix and petitioners' brief on the merits to and including May 27, 2005.
May 26 2005	Brief amicus curiae of National School Boards Association filed.
May 27 2005	Brief amicus curiae of United States filed.
May 27 2005	Joint appendix filed. (Jt. Appendix in three volumes.)
May 27 2005	Brief of petitioners Gil Garcetti, et al. filed.
May 27 2005	Brief amicus curiae of International Municipal Lawyers Association filed.
May 27 2005	Brief amici curiae of National Association of Counties, et al. filed.
Jun 3 2005	Extension of time within which to file respondent's brief on the merits to and including July 22, 2005.
Jul 20 2005	CIRCULATED.

Jul 20 2005	SET FOR ARGUMENT on Wednesday, October 12, 2005.
Jul 21 2005	Brief amici curiae of Thomas Jefferson Center for the Protection of Free Expression, et al. filed. (Distributed)
Jul 22 2005	Brief amicus curiae of National Treasury Employees Union filed. (Distributed)
Jul 22 2005	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. (Distributed)
Jul 22 2005	Brief amici curiae of Association of Deputy District Attorneys, et al. filed. (Distributed)
Jul 22 2005	Brief amicus curiae of National Education Association filed. (Distributed)
Jul 22 2005	Brief amici curiae of Government Accountability Project, et al. filed. (Distributed)
Jul 22 2005	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)
Jul 22 2005	Brief of respondent Richard Ceballos filed. (Distributed)
Jul 28 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 29 2005	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Aug 11 2005	Record received from U.S.D.C. for Central Dist. of California. (1 box)
Aug 2[illegible] 2005	Reply of petitioners Gil Garcetti, et al. filed. (Distributed)
Sep 2 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 12 2005	Argued. For petitioners: Cindy S. Lee, Glendale, Cal.; and Dan Himmelfarb, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae.) For respondent: Bonnie I. Robin-Vergeer, Washington, D.C.

Supreme Court, U.S.
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No. 04 473 OCT 1 - 2004

In The

Supreme Court of the United States

GIL GARCETTI, *et al.*,

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CINDY S. LEE, State Bar No. 168941
Counsel of Record
JIN S. CHOI, State Bar No. 180270
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Telephone (818) 545-1925

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QUESTIONS PRESENTED

1. Should a public employee's purely job-related speech, expressed strictly pursuant to the duties of employment, be cloaked with First Amendment protection simply because it touches on a matter of public concern, or should First Amendment protection also require the speech to be engaged in "as a citizen", in accordance with this Court's holdings in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983)?

2. Is immediate review by this Court necessary to address the growing inter-circuit conflict on the question of whether a public employee's purely job-related speech is constitutionally protected, especially where the lack of uniformity dramatically impacts the ability of all public employers to effectively manage their respective agencies?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list represents all of the parties before the United States Court of Appeals for the Ninth Circuit:

The petitioners are Gil Garcetti, the former District Attorney for the County of Los Angeles, Frank Sundstedt, Carol Najera and the County of Los Angeles, all of whom were appellees below. Richard Ceballos was the appellant below.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 361 F.3d 1168 (9th Cir. 2004) and is reprinted at Appendix A. The district court's unreported memorandum order granting petitioners' motion for summary judgment on the First Amendment retaliation claim is reprinted at Appendix B, and the Judgment is reprinted at Appendix C. The Ninth Circuit's denial of the petition for rehearing en banc is reprinted at Appendix D.

JURISDICTION

The Court of Appeals' judgment was entered on March 22, 2004. (App. 1.) On July 6, 2004, the Ninth Circuit denied the petition for rehearing en banc. (App. 71.)

The petition is filed within 90 days of the entry of the judgment pursuant to 28 U.S.C § 1201(c) and U.S. Supreme Court Rule 13.1. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions relevant to this petition are as follows:

1. 42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage,

of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ... "

2. The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, . . . ; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This case involves an employment action filed by a prosecutor, Richard Ceballos ("Respondent"), alleging retaliation in violation of his First Amendment right to freedom of speech against former District Attorney of the County of Los Angeles Gil Garcetti, Frank Sundstedt, Carol Nagera and the County of Los Angeles ("Petitioners"). The alleged retaliation (in the form of a change in assignment and the denial of promotion) purportedly occurred as a result of Respondent's preparation of a routine disposition memorandum containing his professional evaluation of the accuracy of a search warrant affidavit in a pending criminal case. It was undisputed that the disposition memorandum was prepared pursuant to Respondent's regular duties as a prosecutor and was reviewed by only two supervisors. (App. 2-3, 12, 41-42.)

On summary judgment, the district court dismissed Respondent's section 1983 First Amendment claims on the ground that the subject memorandum did not constitute protected speech because it had been prepared strictly pursuant to his normal job duties. (App. 60-65.) Relying primarily on the language and analysis in *Connick v. Myers*, 461 U.S. 138 (1983), the district court found that the communication at issue – Respondent's memorandum regarding his professional evaluation in a pending criminal case – had not been engaged in "as a citizen" but "pursuant to his duties as a prosecutor" in that the memorandum (1) set forth a summary of Respondent's investigation and his conclusion that the search warrant affidavit in the criminal case was falsified and misleading; (2) recommended that the case be dismissed; (3) was only reviewed internally by his supervisors; and (4) was something that a prosecutor commonly prepared "as part of his job". (App. 61-62, 64.) Indeed, central to the district court's ruling was the recognition that the preparation of the subject memorandum about possible perjured testimony was not only part of Respondent's job as a prosecutor but also mandated by his (and the government's) "duties under the due process clause of the Fifth and Fourteenth Amendments not to introduce or rely on evidence known to be false." (App. 64.) Accordingly, judgment was entered against Respondent on February 8, 2002, and he subsequently appealed.

On appeal, the Ninth Circuit Court of Appeals reversed the entry of summary judgment, and in doing so, Judge Reinhardt, writing for the majority opinion, employed a vastly different approach. While making clear that it was only concerned with "on-the-job, work-related

speech,"[1] the Court of Appeals held that regardless of whether the disposition memorandum was an example of routine prosecutorial work product, it was constitutionally protected since it touched on a matter of public concern. According to the Court of Appeals, "[i]t is only when it is clear that . . . the information would be of *no* relevance to the public's evaluation of the performance of governmental agencies that speech of government employees receives no protection under the First Amendment." (App. 10, internal quotations and citations omitted; emphasis in original.) The decision to give no weight to the fact that the disposition memorandum was prepared pursuant to Respondent's normal prosecutorial duties was not (and could not have been) based on the decisions of this Court. Instead, the Court of Appeals relied on the holding in a prior, similarly flawed Ninth Circuit opinion, *Roth v. Veterans' Administration of the Gov't of the United States*, 856 F.2d 1401 (9th Cir. 1988). (App. 10-13.) By relying on *Roth*, the Court of Appeals reaffirmed an approach that cannot be reconciled with the decisions of this Court – that public employee speech with no element of "citizen speech" deserves the full protection of the First Amendment, just because it touches upon a matter of public concern.[2]

[1] App. 8, n. 4.

[2] It should be noted that Judge O'Scannlain's special concurrence in the opinion below challenged the majority panel's rationale, urged that the controlling prior opinion be overruled and discussed at length the necessity of review by this Court. (App. 32-51.)

REASONS FOR GRANTING THE PETITION

I. CONTRARY TO THE DECISIONS OF THIS COURT, THE NINTH CIRCUIT ERRONEOUSLY DISREGARDED THE "CITIZEN SPEECH" REQUIREMENT FOR FIRST AMENDMENT PROTECTION IN THE PUBLIC EMPLOYMENT SETTING, THEREBY ADDING TO THE GROWING INTER-CIRCUIT CONFLICT.

This Court's two seminal opinions took exacting steps in both *establishing and limiting* First Amendment protection in the public employment setting. These significant limitations and their underlying rationale, however, were ignored by the Court of Appeals below, thereby continuing the Ninth Circuit's deviation from this Court's rationale and mandate. Moreover, review is warranted due to the absence of uniformity across the board among the federal courts on this question of exceptional importance – the answer to which affects the management and administration of practically every federal, state and local governmental agency throughout this country.

A. The Establishment And Protection Of The Right Of Public Employees *To Speak As Citizens* Were Cornerstone Concerns In *Pickering* And *Connick*.

Even a cursory survey of the pertinent cases over the last two decades reveals that the determination of whether a public employee's speech is entitled to First Amendment protection is governed by this Court's analysis in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). However, when this analysis has been applied in the Ninth Circuit and several other Circuits, one of the fundamental tenets underlying this

analysis – that the First Amendment protects public employee speech engaged in "as a citizen" – has been rendered irrelevant and meaningless.

In 1968, in *Pickering*, a case where a public school teacher challenged his discharge based on his public criticism of the allocation of school funds and its method of informing taxpayers of the need for additional revenue, this Court held for the first time that the First Amendment protects public employee speech on matters of "public concern". Such speech, however, was not blanketed with constitutional protection. On the contrary, the scope of constitutional protection was made subject to significant restrictions, in part, because "the State has *interests as an employer* in regulating the speech of its employees that *differ significantly* from those it possesses in connection with regulation of the *citizenry in general*." *Id.* at 568 (emphasis added).

Indeed, the rationale behind the holding in *Pickering* rested on the fundamental notion that public employees should not be deprived of First Amendment protection for acts of expression directly associated with the exercise of a *citizen's* right to free speech.

> The problem in any case is to arrive at a balance between the interests of the [plaintiff], *as a citizen, in commenting upon matters of public concern* and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. . . . [W]e shall indicate some of the general lines along which an analysis of the controlling interests should run.

Id. at 568-69 (emphasis added).

The speech at issue in *Pickering* fit the mold for constitutional protection. The teacher's speech was "in no way directed towards any person with whom [the plaintiff] would normally be in contact in the course of his daily work", thereby raising no questions regarding "either discipline by immediate superiors or harmony among coworkers". *Id.* at 569. The absence of the link between the subject speech and the plaintiff's essential job duties was further addressed in the holding:

> [I]n a case such as the present one, in which *the fact of employment is only tangentially and insubstantially involved* in the subject matter of the public communication made by a teacher, we conclude that *it is necessary to regard the teacher as the member of the general public he seeks to be*. In sum, we hold that . . . a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

Id. at 574 (footnote omitted, emphasis added).

Thus, in *Pickering*, this Court established distinct parameters for First Amendment protection – public employees, by virtue of their employment, should not be deprived of First Amendment protection when the subject speech is expressed pursuant to the exercise of the rights of citizenship (as opposed to speech expressed in accordance with the responsibilities of public employment). These parameters were reaffirmed, 15 years later, in the next landmark case, *Connick v. Myers*.

In *Connick*, the plaintiff, an assistant district attorney, circulated a questionnaire among her co-workers, soliciting opinions on a variety of matters related to the work environment at her office. *Id.* at 141. The district

court held that the plaintiff's "questionnaire involved matters of public concern" and that the defendant had not demonstrated that the questionnaire substantially interfered with the operation of the district attorney's office. *Id.* at 142. The court of appeals affirmed. *Id.* This Court, however, held that the lower courts had "misapplied our decision in *Pickering* and consequently, in our view, erred in striking the balance" for the plaintiff. *Id.*

Significantly, this Court reiterated the centerpiece issue addressed in *Pickering* – how to balance the public employer's legitimate interest in an efficient workplace environment against the public employee's interest in commenting on matters of public concern "as a citizen." *Id.* at 140. Moreover, in defining the elements of the constitutional equation to be applied in this setting, this Court once again identified speech engaged in "as a citizen" to be one of the primary variables.

The defendant in *Connick* argued that no balancing was required because the subject questionnaire "concerned only internal office matters and that such speech is not upon a matter of 'public concern.'" *Id.* at 143. This Court stated that this argument had "much force" and highlighted the "as a citizen" factor first identified in *Pickering*: the "*repeated emphasis in Pickering on the right of a public employee 'as a citizen*, in commenting upon matters of public concern,' *was not accidental.*" *Id.* at 143 (emphasis added). This Court then discussed the pertinent historical background that led to the landmark holding in *Pickering*:

> In all of these cases, the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in *public affairs*. . . . The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . *Pickering . . . followed this understanding of the First Amendment.*

Id. at 144-45 (emphasis added). For these reasons, the speech in *Pickering* – which was related to a "free and open debate" – had been afforded constitutional protection. *Pickering*, 391 U.S. at 571.

Indeed, the holding in *Connick* could not have been clearer in identifying the importance of the "citizen speech" factor:

> We hold only that *when a public employee speaks not as a citizen upon matters of public concern*, but instead *as an employee* upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147 (emphasis added).[3]

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[3] Despite the clear implications of this key portion of *Connick*, confusion among the Circuits may have arisen because this Court has not yet provided an unequivocal holding as to whether purely job-related speech about a matter of public concern is constitutionally protected. Keeping such speech outside the reach of the First Amendment would not only be consistent with the significant concerns articulated in *Pickering* but would also help public employers maintain workplace efficiency. *See* Section II, *infra*. Moreover, since *Pickering*, this Court has not otherwise wavered from the pronouncements regarding the importance of "citizen speech". *See Perry v. Sindermann*,

(Continued on following page)

An additional significant corollary to the holding in *Connick* was the unquestionable intention to prevent the over-extension of First Amendment protection in the public employment setting:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case.

Connick, 461 U.S. at 149; *see also Rankin*, 483 U.S. at 384 ("[R]eview of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions."); *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 (5th Cir. 1986) ("[T]he mere fact that the topic of the employee's speech was one in which the public might or would have a great interest is of little moment . . . because almost anything that occurs within a public agency could be of concern to the public.").

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408 U.S. 593 (1972) (finding protected a public college's testimony before a state legislature); *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977) (finding protected a public school teacher's communication with a radio station regarding the school's dress code for teachers); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979) (finding protected a teacher's private remarks with a supervisor regarding the school district's allegedly racially discriminatory policies); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) ("Vigilance is necessary to ensure that public employers do not use authority over employees *to silence discourse. . . .*") (emphasis added); *United States v. National Treasury Employees Union*, 513 U.S. 454, 465 (1995) (in holding unconstitutional the prohibition of government employees from receiving honoraria, this Court stated that the employees "seek compensation for their expressive activities in their *capacity as citizens*" and the speeches lack "relevance to their employment") (emphasis added).

These concerns and the importance of the "citizen speech" factor have been recognized by the lower courts that have refused to find First Amendment protection for purely job-related speech.[4] The Ninth Circuit, and others, however, have not followed suit, disregarding the "citizen speech" element entirely. In light of recent case law developments in the lower courts, only intervention by this Court will ensure that First Amendment protection be wedded to public employee speech engaged in "as a citizen".

B. The Ninth Circuit Has Refused To Give Any Consideration To The Element Of "Citizen Speech" In Determining Whether A Public Employee's Speech Is Constitutionally Protected.

In the instant case, the Ninth Circuit Court of Appeals held that the Respondent's disposition memorandum was constitutionally protected despite the absence of any hint of citizen speech. In particular, the *form* of the subject speech was a deputy district attorney's routine disposition memorandum reviewed only internally; the *content* of the memorandum consisted of Respondent's professional opinion regarding the propriety of a search warrant affidavit, an opinion reached in conjunction with his normal prosecutorial duties. Simply put, the memorandum was not prepared while Respondent was playing the role of

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[4] As Judge O'Scannlain observed in his special concurrence below, "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right. Instead, their speech is, in actuality, the State's." (App. 41, emphasis in original.)

a "citizen", and nor was it in any way related to his participation in "public affairs." Nevertheless, the Court of Appeals flatly disregarded these significant facts by relying on a 16-year-old case, *Roth v. Veterans' Administration of the Gov't of the United States*, 856 F.2d 1401 (9th Cir. 1988). The reliance on *Roth* was in error because *Roth* signified the Ninth Circuit's early departure from the clear limits on the constitutional protection afforded to public employment speech.

In *Roth*, the plaintiff sued three of his supervisors at the Veterans Administration, alleging that they retaliated against him in violation of his First Amendment rights. Plaintiff had been hired as the Chief of the Alcohol Inpatient Unit and was responsible for overseeing the operations of that unit. *Id.* at 1403. Accordingly, the plaintiff "reported wastefulness, mismanagement, unethical conduct, violations of regulations, and incompetence to his supervisors". *Id.* In response to these purported "whistleblowing" activities, the plaintiff alleged that he was demoted and then informed that his employment would be terminated. *Id.* at 1403-04.

The defendants argued that the plaintiff "was not commenting on matters of public concern, but merely gave his opinions on matters of personal interest and office management." *Id.* at 1404. In addressing this issue, the *Roth* Court commented on the elements of the *Connick* analysis but did not apply them properly or completely. Instead, it focused almost exclusively on the content, stating that speech regarding the "efficient and ethical operation of the VA" was "inherently of interest to the public." *Id.*

The *Roth* Court's limited examination of the form and context of the subject speech did not adhere to this Court's mandate regarding the importance of "citizen speech". In fact, by emphasizing that the subject speech was engaged in pursuant to the plaintiff's job duties and "at the wish of the defendants", *the absence of citizen speech was weighed in favor of finding First Amendment protection*. *Id.* at 1406. Indeed, the plaintiff's theory of liability was that his First Amendment rights had been violated because he had been punished for engaging in *speech required by his job*. In the instant case, the Court of Appeals once again engaged in this flawed analysis.

Cloaking such speech with First Amendment protection is irreconcilable with this Court's mandate that First Amendment protection be reserved for speech that is expressed "as a citizen." The Court of Appeals' failure to recognize and properly consider this factor is especially troubling because this Court's mandate is consistent on all levels with the historical and legal backdrops that led to the abandonment of the bar against First Amendment protection for public employees. This dramatic change empowered public employees to engage in the same First Amendment activities engaged in by other members of the public; however, these activities do not and should not include speech expressed pursuant to the regular duties of public employment since such speech, by definition, cannot be characterized as "citizen speech".[6]

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[6] Judge O'Scannlain advocated the revamping of the Ninth Circuit's approach in his special concurrence below and crystallized the issue at hand with great clarity:

> Properly understood, *Connick* teaches that although speech uttered by public employees must address an issue of public

(Continued on following page)

C. The "Citizen Speech" Factor Has Often Been Recognized, And At The Same Time, Often Ignored, Thereby Creating A Major Inter-Circuit Conflict That Should Now Be Addressed.

The Ninth Circuit's short-circuited approach has not been uniformly adopted. Indeed, faced with similar facts and issues, many courts have engaged in a more meaningful analysis by remaining true to this Court's mandates. For instance, in *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001), the plaintiff, a former police officer who had been terminated, brought a section 1983 action against two of his supervisors, the chief of police, and the city, alleging that his termination had been the product of retaliation against him for his "speech as an [Office of Professional Standards] investigator." *Id.* at 940. The *Gonzalez* Court affirmed the granting of the defendants' motion to dismiss on the ground that the speech in question – the reports regarding police misconduct that the plaintiff had written when he was an OPS investigator – could not be characterized as "citizen speech" upon a matter of public concern. In reaching this holding, the

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import in order to come within the protective shelter of the First Amendment, satisfaction of such a virtually necessary condition is not by itself sufficient to trigger constitutional constraints on governmental action. Instead, employee speech solicits the protection of the First Amendment only when it also results from the employer's decision to express his or her *personal* opinions – that is, those views he or she holds *as a citizen* and not as a public employee. *The First Amendment, in short, does not protect public employees' routine and required speech on behalf of the government.*

(App. 49-50, emphasis added.)

Gonzalez Court did not lose sight of the significance of "citizen speech":

> [The plaintiff]'s statements are not self-serving private statements (except in the sense that performance of one's job is self-serving), but *written statements for internal use in the Department. They are reports of his investigations as required by his employer, and as such, they lack First Amendment protection.* . . . Thus, the question before us is whether a public employee receives First Amendment protection for producing writings that may address matters of public concern, *but are also a routine requirement of the job.* . . . [H]e was clearly acting entirely in an employment capacity when he made those reports. The *form* of his speech (routine official reports), the *content* of the speech (required opinions on misconduct), and the *context* (pursuant to duties of the job), all indicate that [the plaintiff] *did not speak 'as a citizen' on a matter of public concern.*

Id. at 941 (emphasis added).

Gonzalez is not alone in focusing on the "hat worn" by the employee. *See Urofsky v. Gilmore, III*, 216 F.3d 401, 407 (4th Cir. 2000) ("critical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is 'made primarily in the [employee's] *role as citizen or primarily in his role as employee*' ") (emphasis added); *Gillum v. City of Kerrville*, 3 F.3d 117, 120-21 (5th Cir. 1993) (having previously focused on whether the employee "spoke as a citizen or employee", the Court explained that the "focus on the hat worn by the employee when speaking rather than upon the 'importance' of the issue reflects the reality that at some level of generality almost all speech of state employees is of public

concern."); *Bradshaw v. Pittsburgh Independent School Dist.*, 207 F.3d 814, 186 (5th Cir. 2000) ("Speech rises to the level of public concern when an individual speaks primarily as a citizen rather than as an employee."); *Thompson v. Scheid*, 977 F.2d 1017, 1020-21 (6th Cir. 1992) ("First Amendment protection extends to a public employee's speech when he speaks as a citizen on a matter of public concern, but *does not extend to speech made in the course of acting as a public employee*. [Citation.] Not all matters discussed within a government office are of public concern, and thus internal office communication does not necessarily give rise to a constitutional claim.") (citing *Connick*, emphasis added); *Sparr v. Ward*, 306 F.3d 589, 594 (8th Cir. 2002) ("When a public employee's speech is purely job-related, her speech will not be deemed a matter of public concern. . . . It is not enough that the topic of an employee's speech is one in which the public might have an interest."); *Buazard v. Meridith*, 172 F.3d 546, 548 (8th Cir. 1999) (in examining the form and context of public employee speech, a court should consider whether the speech "is purely job-related" and whether the employee "is *speaking as a concerned citizen, and not just as an employee*") (emphasis added); *Koch v. Hutchinson*, 847 F.2d 1436, 1442 (10th Cir. 1988) (denying First Amendment protection to a fire marshal's report regarding the cause of a fatal fire because the speech "occurred during or as part of an employee's official duties").

Competing against the analyses and holdings in these cases are those from other cases where the Ninth Circuit's approach has been duplicated. As a matter of fact, the Court of Appeals below described a legal scorecard suggesting that the majority of the Circuits have now all but abandoned the consideration of the "citizen speech" factor

in determining whether a public employee's speech is constitutionally protected. (App. 14-16, and cases cited therein.) *See also Lee v. Nicholl*, 97 F.3d 1291, 1294-95 10th Cir. 1999) (a public employee's memos related to the safety of public roads prepared "during the course of his employment" constitute protected speech); *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1292 (11th Cir. 2000) (police officers' request to supervisor for permission to report to the district attorney of observation of two fellow officers' improper review of jail records is protected speech even if the observation was made in the course of employment).

Adding to the conflict and confusion in the current legal landscape is that opinions from *within* certain Circuits are not readily reconcilable with one another. For instance, in *Rodgers v. Banks*, 344 F.3d 587 (6th Cir. 2003), one Sixth Circuit panel held that a work-related memorandum by a director of quality management is constitutionally protected, while in *Thompson*, 977 F.2d 1017, another Sixth Circuit panel held that a fraud investigator's report did not warrant constitutional protection. Similar internal conflicts have arisen in the Seventh, Eighth and Tenth Circuits.[6] (App. at 16, n. 7.)

While the Court of Appeals below suggests that its approach is, for lack of a better word, winning, no clear-cut

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[6] Presently, before this Court is a Petition for Writ of Certiorari arising from a case (*Jones v. Delgado*, Docket No. 03-3408) with facts similar to the instant case, in which a Seventh Circuit panel found that the First Amendment protects speech engaged in pursuant to employment duties, by drawing a questionable distinction from the facts in *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001) where job-related speech was held to be constitutionally unprotected.

winner can be declared. Moreover, regardless of the exact status of the legal ledger, what is indisputable is that over the last two decades, the lower courts have been unable to come to an agreement as to how the *Pickering-Connick* analysis should be employed, particularly as to what extent the "citizen speech" factor should be considered and where employment-required speech falls in the First Amendment spectrum. The absence of uniformity will certainly continue to breed more confusion and inconsistency in this highly litigated area of public employment and First Amendment law, circumstances that raise the proverbial red flag for review by this Court.

II. THE QUESTIONS PRESENTED ARE IMPORTANT IN THAT BLANKETING ALL PUBLIC EMPLOYEE SPEECH TOUCHING ON A MATTER OF PUBLIC CONCERN WITH FIRST AMENDMENT PROTECTION WILL HAVE A DEBILITATING EFFECT ON THE MANAGEMENT OF PUBLIC AGENCIES.

The refusal to reserve First Amendment protection to speech expressed "as a citizen" is not only inconsistent with *Pickering* and *Connick*, but will have a crippling effect on the management of most, if not all, public agencies. This inevitable disruption will be caused by the looming threat of First Amendment litigation arising from any allegedly adverse employment decision that is purportedly related to any single instance of that employee's prior job-related speech – as long as that speech can be characterized as touching on a matter of public concern. It is not difficult to imagine the trepidation that will accompany necessary employment actions (ranging from routine transfers and changes in assignment to denial of promotions

and discharge) involving potentially disgruntled employees, so much so that the efficient management and administration will become unduly burdensome and needlessly complicated. *See Rankin*, 483 U.S. at 384 ("public employers are *employers*, concerned with the efficient function of their operations") (emphasis in original).

Moreover, the debilitating effect of making First Amendment protection contingent only on whether the speech conceivably relates to an issue of public import will be especially pronounced in public agencies that routinely become entangled with issues that necessarily would interest the public. These state and federal agencies include, but certainly are not limited to, those that employ prosecutors, law enforcement officers, health and medical professionals and industrial regulations investigators. Indeed, the vast majority, if not all, of the public employers in this country will be forced to grapple with the short and long-term effects of the continuing erosion of the sound limitations on First Amendment protection in the public employment setting.[7]

This certainly was not the result intended when this Court first opened the door for public employees to receive First Amendment protection for their exercise, "as citizens", of their freedom of speech. In that first landmark case, this Court made clear that the dramatic change in First Amendment law was meant to address the draconian

[7] This stripped down version of the *Pickering-Connick* analysis begs the question of whether the recent rounds of highly-publicized testimony offered by numerous government employees – pursuant to their official job duties – before various Congressional committees and the 9/11 Commission were, without exception, blanketed with First Amendment protection.

deprivation of First Amendment rights simply by virtue of public employment; these same sentiments were recognized again in this Court's next landmark case. The lifting of the bar against First Amendment protection, however, should not be transformed into a ticket for First Amendment protection for speech expressed in the course of the performance of a public employee's job duties. Such an approach will have dire consequences on the management of public agencies, does not adhere to the underlying rationale of this Court's seminal cases and excludes from the analysis the pivotal element of "citizen speech". Yet, the Ninth Circuit and others have chosen this misguided path, thereby necessitating review by this Court of this exceptionally important issue of law.

CONCLUSION

The petition for writ of certiorari should therefore be granted.

Respectfully submitted,

CINDY S. LEE, State Bar No. 168941
Counsel of Record
JIN S. CHOI, State Bar No. 180270
FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Telephone (818) 545-1925

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APPENDIX A

361 F.3d 1168

United States Court of Appeals,
Ninth Circuit.

Richard CEBALLOS, Plaintiff-Appellant,
v.
Gil GARCETTI; Frank Sundstedt; Carol Najera;
County of Los Angeles,
Defendants-Appellees.

No. 02-55418.

Argued and Submitted June 2, 2003.
Filed March 22, 2004.

Humberto Guizar and Luis Carillo, Montebello, CA, for the Plaintiff-Appellant.

Cindy S. Lee and Adrian Barrio, Glendale, CA, for the Defendants-Appellees.

Appeal from the United States District Court for the Central District of California; A. Howard Matz, District Judge, Presiding. D.C. No. CV-00-11106-AHM.

Before: REINHARDT, O'SCANNLAIN, and FISHER, Circuit Judges.

REINHARDT, Circuit Judge:

Richard Ceballos filed this action pursuant to 42 U.S.C. § 1983 contending that he was subjected to adverse employment actions by his supervisors at the Los Angeles County District Attorney's Office in retaliation for engaging in speech protected by the First Amendment. He also asserts that the county fails to train, supervise, and discipline its district attorneys regarding such unlawful retaliation.

The district court granted a motion for summary judgment in favor of the individual defendants – the District Attorney (in his individual capacity), the then-Head Deputy District Attorney, and Ceballos's immediate supervisor – on the basis of qualified immunity, and granted a separate motion for summary adjudication in favor of the county defendants – the county and the District Attorney (in his official capacity) – on the basis of Eleventh Amendment immunity. Given that the disputed facts must be resolved in Ceballos's favor and that all inferences that may reasonably be drawn must also be drawn in his favor, we reverse the district court's rulings. We hold that, for purposes of summary judgment, qualified immunity was not available to the individual defendants because the law was clearly established that Ceballos's speech addressed a matter of public concern and that his interest in the speech outweighed the public employer's interest in avoiding inefficiency and disruption. Because the Eleventh Amendment does not apply to political subdivisions of the state, the county could ordinarily not assert sovereign immunity, although in this case it could do so if such immunity applied to the District Attorney. Whether the District Attorney, when acting in his official capacity, is entitled to such immunity depends on whether he was performing a state or a county function when he took the alleged actions with respect to Ceballos. We hold that in most respects he was acting in the latter capacity. Thus, he is not entitled to Eleventh Amendment immunity, and neither is the County.

BACKGROUND

Ceballos has been a deputy district attorney since 1989. In 1997 or 1998 he was assigned to the District

Attorney's Office's Pomona Branch and about a year later was promoted to calendar deputy, with supervisory responsibilities over two to three deputy district attorneys. In late February 2000, a defense attorney in *People v. Cusky,* a case then being prosecuted by the District Attorney's Office, told Ceballos that he believed that one of the arresting deputy sheriffs may have lied in a search warrant affidavit. He asked Ceballos to investigate. Ceballos was supervising the deputy district attorney assigned to the case, but he decided to investigate the allegations himself. After reviewing the relevant documents in the case and visiting the crime scene, Ceballos determined that the affidavit of the deputy sheriff had, at the least, grossly misrepresented the facts.

Ceballos discussed the problems arising from this investigation with others in the Office, including his immediate supervisor, Carol Najera and the then-Head Deputy District Attorney, Frank Sundstedt. Everyone agreed that the validity of the warrant was questionable. On March 2, 2000, Ceballos sent Sundstedt a memorandum discussing his determination that the affidavit was falsified and recommending that the case be dismissed. Sundstedt instructed Ceballos to revise the memorandum to make it less accusatory of the deputy sheriff. Ceballos rewrote the memorandum, and a meeting was held on March 9 with representatives from the Sheriff's Department, Sundstedt, Najera, Ceballos, and another deputy district attorney.

Following the meeting with the Sheriff's Department, Sundstedt was not certain that *Cusky* should be dismissed and decided to proceed with the case pending the outcome

of a motion challenging the search warrant, which had already been filed by the defense.[1] Ceballos informed defense counsel that he believed the affidavit contained false statements, and defense counsel subpoenaed him to testify at the hearing. Ceballos told Najera that pursuant to *Brady v. Maryland* and other case law, he was obligated to turn over to the defense the memoranda he had prepared regarding his opinion of the legality of the search warrant. Ceballos contends that Najera instructed him to edit the memorandum to include statements by only one detective and to limit his in-court testimony. When Ceballos testified at the hearing on the motion, the *Cusky* court sustained the prosecution's objections to several questions defense counsel asked him. Ceballos maintains that, as a result, he was unable to tell the court certain of his conclusions (and the reasons therefor) regarding the accuracy of the warrant. The defendant's motion was denied, and the prosecution proceeded. Having testified for the defense, Ceballos was removed from the *Cusky* prosecution team.

Ceballos alleges that Garcetti, Sundstedt, and Najera retaliated against him for submitting the memorandum regarding the *Cusky* warrant, for otherwise reporting to or discussing with other persons the allegations of misconduct by the deputy sheriff, and for testifying truthfully at the court hearing. He alleges that the defendants took a number of retaliatory actions against him: (1) they demoted him from his position of calendar deputy to that of

[1] The motion asserted that there was a statement or omission in the warrant that was made deliberately or in reckless disregard of the truth, and that had the judge approving the warrant known the truth regarding the statement, he would not have issued it.

trial deputy; (2) Najera "threatened" him when he told her that he would testify truthfully at the hearing; (3) at the hearing itself Najera was "rude and hostile" to him; (4) Sundstedt "gave [him] the silent treatment"; (5) Najera informed him that he could either transfer to the El Monte Branch, or, if he wanted to remain in the Pomona Branch, he would be re-assigned to filing misdemeanors, a position usually assigned to junior deputy district attorneys;[2] (6) the one murder case he was handling at the time was reassigned to a deputy district attorney with no experience trying murder cases;[3] (7) he was barred from handling any further murder cases; and (8) he was denied a promotion.

Ceballos filed a complaint in the district court pursuant to § 1983 against Najera, Sundstedt, and then-District Attorney Gil Garcetti in their individual capacities, as well as against Garcetti in his official capacity and the County of Los Angeles. He sought lost wages and other compensatory damages as well as injunctive relief. The county defendants moved for summary adjudication, which the district court granted on the ground that the Eleventh Amendment barred the action. Ceballos amended his complaint, and the individual defendants moved for summary judgment, which was granted on the ground that they were protected by qualified immunity. The district court declined to exercise jurisdiction over Ceballos's state law

[2] The transfer to the El Monte Branch is described by Ceballos as an act of "Freeway Therapy," a practice of punishing deputy district attorneys by assigning them to a branch requiring a long commute to work.

[3] Ceballos asserts that denying him the opportunity to prosecute the murder case adversely affected his opportunities for promotion.

claim for intentional infliction of emotional distress. Ceballos appeals.

ANALYSIS

I. Individual Defendants and Qualified Immunity

Ceballos argues that the district court erred in holding that the individual defendants were entitled to qualified immunity. Public officials are entitled to qualified immunity for acts that do not violate "clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Rivero v. City & County of San Francisco,* 316 F.3d 857, 863 (9th Cir.2002). When considering a defendant's motion for summary judgment on the ground of qualified immunity, we must first determine whether, when the facts are taken in the light most favorable to the plaintiff and the inferences are drawn in his favor as well, these facts and inferences establish that the official's conduct violated a constitutional right. *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If so, we must next consider whether the right was clearly established at the time of the alleged improper act. *Id.* If the right was clearly established, we ask finally whether despite this fact, the official's unconstitutional conduct constituted a reasonable mistake of fact or law. *Id.* at 199, 121 S.Ct. 2151. Then, unless the constitutional error is excused on that ground, summary judgment must be denied.

A. Ceballos's Speech Was Protected By the First Amendment

Ceballos contends that he exercised his First Amendment right to free speech in alleging that a deputy sheriff included false statements in the *Cusky* search warrant affidavit. The parties appear to dispute to whom Ceballos spoke about the alleged misconduct. Ceballos asserts that he told Sundstedt and Najera, other persons in the District Attorney's Office, Sheriff's Department personnel, the *Cusky* judge, and defense counsel about the untruthful affidavit. The defendants state that Ceballos "sent the memorandum to one person, Sundstedt," the Head Deputy District Attorney, but do not expressly dispute Ceballos's assertion that he spoke to the others as well. It is unclear whether the defendants contend that Ceballos's memorandum is all that is relevant here or that the other speech to which Ceballos refers did not occur. For the reasons set forth below, we hold that, for purposes of summary judgment, Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment; accordingly, we need not determine here whether similar protection should be afforded to his other communications. Those matters are best explored at trial.

Although public employees do not relinquish their right to free speech by virtue of their employment, neither do they enjoy absolute First Amendment rights. *Waters v. Churchill,* 511 U.S. 661, 671-74, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994); *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.,* 149 F.3d 971, 977-78 (9th Cir.1998). To determine whether Ceballos's speech is protected by the First Amendment, we apply a two-step test that stems from the Supreme Court's holdings in *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d

708 (1983), and *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968): (1) we ask whether the speech addresses a matter of public concern, and, if it does, (2) we engage in an inquiry, commonly known as the *Pickering* balancing test, to determine whether Ceballos's interest in expressing himself outweighs the government's interests "in promoting workplace efficiency and avoiding workplace disruption." *Rivero*, 316 F.3d at 865 (quoting *Hufford v. McEnaney*, 249 F.3d 1142, 1148 (9th Cir.2001)).

1. Matter of Public Concern[4]

Whether a public employee's speech addresses a matter of public concern is a question of law. *Connick*, 461 U.S. at 148 n. 7, 103 S.Ct. 1684. This determination is made in light of "the content, form, and context" of the speech. *Coszalter v. City of Salem*, 320 F.3d 968, 973-74 (9th Cir.2003) (internal quotation marks omitted). Content is "the greatest single factor in the *Connick* inquiry." *Johnson v. Multnomah County*, 48 F.3d 420, 424 (9th Cir.1995) (quoting *Havekost v. United States Dep't of the Navy*, 925 F.2d 316, 318 (9th Cir.1991)).

A public employee addresses a matter of public concern when his speech relates to an issue of "'political, social, or other concern to the community.'" *Brewster*, 149 F.3d at 978 (quoting *Connick*, 461 U.S. at 146, 103 S.Ct. 1684); *see also Johnson v. Multnomah County*, 48 F.3d 420, 422 (9th Cir.1995). "Speech that concerns issues about

[4] We are concerned here only with on-the-job, work-related speech. *Cf. Roe v. City of San Diego*, 356 F.3d 1108 (9th Cir.2004) (addressing the public concern test in the context of a public employee's off-duty, non-work-related speech).

which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government merits the highest degree of first amendment protection." *Coszalter*, 320 F.3d at 973 (internal quotation marks omitted). In contrast, "speech that deals with individual personnel disputes and grievances and that would be of no relevance to the public's evaluation of the performance of governmental agencies, is generally not of public concern." *Id.*

In defining the scope of First Amendment protection accorded to public employees' speech, the Supreme Court has distinguished between speech "as a citizen upon matters of public concern" at one end and speech "as an employee upon matters only of personal interest" at the other. *Connick*, 461 U.S. at 147, 103 S.Ct. 1684. *Connick* dealt with an assistant district attorney's allegations that her supervisors retaliated against her for distributing a questionnaire to her colleagues. The Supreme Court held that when the assistant district attorney solicited her colleagues' views on office morale, the policy for transferring employees, the need for a grievance committee, and the level of confidence in supervisors, her speech was not protected by the First Amendment because these questions were intended primarily to "gather ammunition for another round of controversy" in the employee's individual personnel dispute. *Id.* at 148, 103 S.Ct. 1684. In contrast, when the assistant district attorney asked her colleagues whether they felt pressured to work in political campaigns, her speech *was* a matter of public concern under the First Amendment because "the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be

able to speak out freely without fear of retaliatory dismissal." *Id.* at 149.

What is critical under *Connick,* as we explained in *Roth v. Veteran's Admin. of United States,* is the "point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?" 856 F.2d 1401, 1406 (9th Cir.1988). Thus, "[i]t is only 'when it is clear that . . . the information would be of *no* relevance to the public's evaluation of the performance of governmental agencies' that speech of government employees receives no protection under the First Amendment." *Ulrich v. City & County of San Francisco,* 308 F.3d 968, 978 (9th Cir.2002) (quoting *Pool v. Vanrheen,* 297 F.3d 899, 907 (9th Cir.2002)).

The individual defendants concede that Ceballos's allegations that an arresting deputy sheriff may have lied in a search warrant affidavit constitutes whistleblowing. We have held that when government employees speak about corruption, wrongdoing, misconduct, wastefulness, or inefficiency by other government employees, including law enforcement officers, their speech is inherently a matter of public concern. *See, e.g., Blair v. City of Pomona,* 223 F.3d 1074, 1079 (9th Cir.2000); *Johnson,* 48 F.3d at 425. The defendants do not argue that Ceballos's First Amendment interest is diminished because his purpose was primarily to further a personal personnel dispute. Instead, they contend that Ceballos's allegations of law enforcement perjury should not be protected because he included them in a memorandum to his supervisors that he prepared in fulfillment of an employment responsibility.

Under *Connick,* speech that is protected by virtue of its content does not lose that protection simply because the speech is directed to other employees of that governmental employer rather than to members of the public. 461 U.S. at 147-49, 103 S.Ct. 1684. In particular, we have repeatedly held that speech exposing official wrongdoing is no less deserving of First Amendment protection because the public employee reported the misconduct to his supervisors rather than to the news media. *See, e.g., Hufford,* 249 F.3d at 1150 ("It would be absurd to extend First Amendment protection only to those whistle-blowers who immediately appear on the local news."); *Ulrich,* 308 F.3d at 979 ("[T]he public employee does not forfeit his protection against governmental retaliation because he chose to press his cause internally."); *Keyser v. Sacramento City Unified Sch. District,* 265 F.3d 741, 747 (9th Cir.2001) (holding that employees did not forgo First Amendment protection when they met with the School District's board for the purpose of charging that their supervisor's evaluation practices violated District policy and that he was misusing federal funds).

Nor do our cases provide any support for the defendants' contention that a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility. In *Roth,* the plaintiff was fired from his position as "trouble shooter" at the Veterans Administration after he exposed corruption, mismanagement, and other problems in written reports that were prepared as part of his job responsibilities. 856 F.2d at 1406. Concluding that Roth's comments were not to further personal grievances, but rather "for the express purpose of addressing . . . problems besetting the VA, at

the wish of the defendants and for the good of the institution, the Veterans it serves, and the public," we held that Roth could not be denied First Amendment protection simply because his efforts to expose wrongdoing were included in reports written pursuant to his employment duties. *Id.*

In other cases we have similarly found public employees' speech to be a matter of public concern even though it was made in furtherance of an employment responsibility. In *Nunez v. Davis,* 169 F.3d 1222, 1226 (9th Cir.1999), a judge directed the court administrator to assign only those clerks who had worked on his reelection campaign to attend training sessions. In protest of the policy, the administrator arranged for two clerks who did not campaign for the judge to attend the sessions. *Id.* We held that this act of protest constituted symbolic speech on a matter of public concern. *Id.* at 1228; *see also Pool,* 297 F.3d at 907-08 (holding that an employee whose job duties included addressing diversity and acting as a liaison to the African American and Latino communities spoke on matters of public concern when she spoke about issues of racial and ethnic diversity in the sheriff's office).

Although our cases are clear, our specially concurring colleague contends that we should revisit en banc our holdings in *Roth* and its progeny and establish a per se rule that public employees are not protected by the First Amendment when their speech is uttered in the course of carrying out their employment obligations. We disagree. The right of public employees to speak freely on matters of public concern is important to the orderly functioning of the democratic process, because public employees, by virtue of their access to information and experience

regarding the operations, conduct, and policies of government agencies and officials, "are positioned uniquely to contribute to the debate on matters of public concern." *Weeks v. Bayer,* 246 F.3d 1231, 1235 (9th Cir.2001) (quoting *Gilbrook v. City of Westminster,* 177 F.3d 839, 870 (9th Cir.1999)). Stripping them of that right when they report wrongdoing or other significant matters to their supervisors would seriously undermine our ability to maintain the integrity of our governmental operations.[5]

The proposed per se rule would be particularly detrimental to whistle-blowers, such as Ceballos, who report official misconduct up the chain of command, because all public employees have a duty to notify their supervisors about any wrongful conduct of which they become aware.

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[5] Our colleague tries to justify his proposed rule by explaining that public employees do not have a personal interest in speech relating to their employment duties "other than in doing [their] job well." *Post* at 1189. This proposition is significant, he argues, because the underlying premise of the First Amendment is to protect against infringements upon "individuals' freedom of choice to express *their personal* opinion or otherwise to express *themselves.*" *Post* at 1189 (emphasis in the original). While we agree that the First Amendment facilitates individual autonomy, its protections do not turn upon whether a citizen has a personal interest in a particular expressive activity. Indeed, under *Connick,* personnel grievances, which are often highly personal, do not receive protection at all. As we reiterated above, free speech is essential to an effective democratic process as an institutional matter; we do not value it simply because of the right of individuals to speak on subjects of personal interest. Lest we forget, however, many public servants *do* have a personal stake in ensuring that events surrounding their employment comport with the public interest. Government employees have often sacrificed far more remunerative opportunities in other sectors in response to compelling public needs, such as the inspirational call of our President in 1961: "Ask not what your country can do for you – ask what you can do for your country." For such employees, promoting the public good is a deeply personal mission that is at least as important as personal career advancement.

To deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason.

Moreover, such a per se rule would violate the principles established by *Connick*. Subject to the *Pickering* balancing test, First Amendment protections are available to public employees who suffer retaliation for whistleblowing, regardless of whether the act of whistleblowing consists of informing higher level public officials, Congressional committees, or the media. The Supreme Court in *Connick* made no distinction between internal and external whistleblowing when it noted that speech that is "of public import in evaluating the performance of the District Attorney" may include efforts by an employee "to bring to light actual or potential wrongdoing or breach of public trust." *Connick*, 461 U.S. at 148, 103 S.Ct. 1684.[6]

Other circuits have also rejected any per se rule that a public employee does not receive any First Amendment

[6] The special concurrence further expresses doubts that Ceballos has a "cognizable First Amendment interest" because as a prosecutor, his statements must be attributed to the government, which "has no First Amendment rights." *Post* at 1189-90. However, a public employee who seeks to expose corruption by reporting his concerns to his supervisor is not acting as a spokesperson for the government when he makes his report. We need not consider here under what circumstances a prosecutor assigned to prosecute a corruption case is speaking for the government when he publicly discusses the corrupt practices involved. Thus, contrary to our concurring colleague's belief, there is no conflict between our decision in *Roth*, 856 F.2d 1401, and its progeny, on one hand, and *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), and its progeny, on the other.

protection for speech that occurs within the scope of his employment duties. *See, e.g., Lewis v. Cowen*, 165 F.3d 154, 161-64 (2d Cir.1999) (holding that a public employee did not forgo First Amendment protection when he refused to present proposed policy changes in a positive light to the Connecticut Gaming Policy Board); *Baldassare v. New Jersey*, 250 F.3d 188, 197 (3d Cir.2001) (holding that an internal investigator's statement about other employees' alleged criminal actions "falls squarely within the core public speech delineated in *Connick*" even though his job duties included exposing wrongdoing); *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 367-376 (5th Cir.2000) (refusing to deny First Amendment protection to a library branch manager who wrote a letter to her supervisors suggesting security measures to be taken at library branches); *Rodgers v. Banks*, 344 F.3d 587, 597-602 (6th Cir.2003) (refusing to deny protection to a director of quality management who sent a memorandum stating that the reconfiguration of a patient area would have an adverse effect on patient care); *Taylor v. Keith*, 338 F.3d 639, 643-46 (6th Cir.2003) (holding that police reports raising allegations of brutality against fellow officer touched upon a matter of public concern); *Delgado v. Jones*, 282 F.3d 511, 519 (7th Cir.2002) (refusing to deny protection to an officer's allegations of criminal activities involving a relative of an elected official simply because he included them in a memorandum to his supervisors); *Dill v. City of Edmond*, 155 F.3d 1193, 1202-03 (10th Cir.1998) (holding that an officer's statements and reports to his supervisors regarding his belief that exculpatory evidence existed and was being withheld in a murder case involved a matter of public concern); *Fikes v. City of Daphne*, 79 F.3d 1079, 1084 (11th Cir.1996) (holding that a police officer's report of misconduct by fellow

officers in a high-speed chase addressed a matter of public concern).[7]

To the extent that the defendants or our colleague may be suggesting the adoption of a narrower per se rule – a rule that would deny First Amendment protection to

[7] The special concurrence claims that *Roth*, 856 F.2d 1401, and its progeny are responsible for a lopsided circuit split, *post* at 1187-88, but the cases discussed in the text reveal that the weight of authority in other circuits accords with our precedents. Although in some instances other circuits have held that public employees' speech pursuant to job-related duties did not involve matters of public concern, it was ordinarily because the speech at issue primarily involved either personal grievances or the "routine discharge of assigned functions, where there is no suggestion of public motivation." *Delgado*, 282 F.3d at 519; *see also Dill*, 155 F.3d at 1202-03; *Morris v. Crow*, 142 F.3d 1379, 1381-83 (11th Cir.1998); *cf. Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1292 (11th Cir.2000). Only the Fourth Circuit seems to be moving toward a rule that public employees' speech in the course of carrying out employment obligations is not protected under the First Amendment. *See Urofsky v. Gilmore*, 216 F.3d 401, 407-08 (4th Cir.2000) (en banc). Aside from *Urofsky*, all of the cases that our colleague cites, *post* at 1187-88, either have been narrowed by one or more of the decisions cited in the text above, or they do not stand for the broad rule ascribed to them. *Compare Terrell v. Univ. of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir.1986), *with Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 367-376 (5th Cir.2000); *compare Thomson v. Scheid*, 977 F.2d 1017, 1021 (6th Cir.1992), *with Rodgers v. Banks*, 344 F.3d 587, 597-602 (6th Cir.2003), and *Taylor v. Keith*, 338 F.3d 639, 643-46 (6th Cir.2003); *compare Gonzalez v. City of Chicago*, 239 F.3d 939, 941-942 (7th Cir.2001), *with Delgado v. Jones*, 282 F.3d 511, 519 (7th Cir.2002); *compare Buazard v. Meridith*, 172 F.3d 546, 548 (8th Cir.1999), *with Herts v. Smith*, 345 F.3d 581, 585-86 (8th Cir.2003); *compare Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir.1988), *with Dill v. City of Edmond*, 155 F.3d 1193, 1202-03 (10th Cir.1998). Accordingly, unlike our colleague, we do not perceive any "deep confusion" in the other circuits; rather, these cases point to the nearly unanimous opposition of the federal courts to the imposition of a per se rule denying all First Amendment protection to public employees' speech pursuant to their job-related duties.

speech contained in routine reports or made in the performance of routine job functions – we strongly disagree. The mere fact that a public employee exposes individual wrongdoing or government misdeeds when making a regular as opposed to a special report does not, by itself, result in the denial of First Amendment protection. Whether a job duty is routine or non-routine is a far less important factor for purposes of First Amendment analysis than the content of the public employee's speech.

Regardless of the form in which a government worker makes charges of corruption, criminal misconduct, or public waste, such charges raise serious public concerns that merit careful assessment and justify full application of the *Connick* principles. Indeed, a report that would ordinarily be considered routine by virtue of its form may well become non-routine by virtue of its content, such as when it contains serious charges of official wrongdoing. Finally, a per se rule stripping all First Amendment protection from speech uttered in the performance of routine, as opposed to non-routine, job functions would be inconsistent with the very nature of the *Connick* test which contains a second step that requires us to balance various factors, including some of those that concern our concurring colleague.

In short, that Ceballos prepared his memorandum in fulfillment of a regular employment responsibility does not serve to deprive him of the First Amendment protection afforded to public employees. Not only our own precedent, but sound reason, Supreme Court doctrine, and the weight of authority in other circuits support our rejection of a per se rule that the First Amendment does not protect a public employee simply because he expresses his views in a report to his supervisors or in the performance of his other

job-related obligations. Such speech, like all other public employee speech, is subject to the full two-part *Connick* test described above.

2. Balancing Test

Even though Ceballos's speech constituted a matter of public concern, it is not protected by the First Amendment unless the court also finds that his interest in the speech outweighs the government's interests "in promoting workplace efficiency and avoiding workplace disruption." *Rivero,* 316 F.3d at 865; *accord Pickering v. Bd. of Educ.,* 391 U.S. 563, 571, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The employer bears the burden of proving that the balance of interests weighs in its favor. *Johnson,* 48 F.3d at 426. The "'more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made.'" *Id.* (quoting *Hyland v. Wonder,* 972 F.2d 1129, 1139 (9th Cir.1992)).

The defendants contend that under our holding in *Brewster,* the *Pickering* balancing test favors them because Ceballos spoke to other government employees and not to the public or the media. While in *Brewster* we stated that a "narrow, limited focus and a limited audience weigh against a claim of protected speech," 149 F.3d at 981 (internal quotation marks omitted), we also recognized that "the private nature of the statement does not remove it from the realm of 'public concern' altogether." *Id.* (quoting *Rankin v. McPherson,* 483 U.S. 378, 387 n. 11, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)); *see also Ulrich,* 308 F.3d at 979; *Nunez,* 169 F.3d at 1228. Indeed, the Supreme Court has ruled that speech need not be made publicly

in order to come within the protection of the First Amendment. *See Givhan v. Western Line Consolidated Sch. Dist.,* 439 U.S. 410, 415-16, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). Again, the decisive question is whether the employee spoke with the intention of bringing wrongdoing to light, because we have held that "in a good-faith whistleblowing context, the breadth of one's audience is irrelevant." *Hufford,* 249 F.3d at 1150.

Assuming, for the purposes of our analysis, that the speech at issue is only the memorandum Ceballos sent to Sundstedt, there can be no disputing the fact that he included the material charging misconduct on the part of a law enforcement officer "to bring wrongdoing to light, not merely to further some purely private interest." *Ulrich,* 308 F.3d at 979 (internal quotations omitted). Even if Ceballos's audience was limited, this factor would provide little support to the individual defendants' claim of disruption and inefficiency under *Pickering* because the speech was uttered in a "good-faith whistleblowing context." *Hufford,* 249 F.3d at 1150.

The defendants next maintain that their interests outweigh those of Ceballos because his charges of misconduct by the deputy sheriff were found to be erroneous by the *Cusky* court. The falsity of a statement is a factor to be considered in the *Pickering* balance. *Moran v. Washington,* 147 F.3d 839, 849-50 (9th Cir.1998). We have recognized, however, that in order to encourage public employees to speak out on matters of public concern, the First Amendment will ordinarily be held to protect even false statements, because

> while false statements are not deserving, in themselves, of constitutional protection, "erroneous statement is inevitable in free debate, and . . . it must be

protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times Co. v. Sullivan,* 376 U.S. 254, 271-72, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (quoting *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963)).

Johnson, 48 F.3d at 424. In *Johnson,* we considered the weight to be accorded in a *Pickering* balancing to false statements made with reckless disregard for the truth. *Johnson,* 48 F.3d at 421-26. While noting that recklessly false statements serve a "very limited" First Amendment interest, *id.* at 426 (citing *Arnett v. Kennedy,* 416 U.S. 134, 162-63, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974)), we nonetheless held that even such statements "are not per se unprotected by the First Amendment when they substantially relate to matters of public concern. Instead, the recklessness of the employee and the falseness of the statements should be considered in light of the public employer's showing of actual injury to its legitimate interests, as part of the *Pickering* balancing test." *Id.* at 424.

Unlike in *Johnson,* there is no evidence here that Ceballos spoke recklessly, or that he acted in bad faith. At most, the evidence suggests that his statements proved to be erroneous. As the individual defendants concede, prosecutors have a duty to disclose information favorable to an accused, including information relating to a witness's veracity and integrity. Good-faith statements made in pursuit of this obligation, even if they may ultimately turn out to be incorrect, do not warrant retaliatory action.[8]

[8] We do not mean to suggest, however, that every action-critical, corrective, or otherwise – that a public employer takes in response to an

(Continued on following page)

Accordingly, if Ceballos's statements in the memorandum to his supervisor are ultimately determined to be erroneous, the erroneous nature of the statements *might* lessen the weight of his interests under the *Pickering* balancing test, but that factor would in any event not be sufficient by itself to deprive Ceballos of all First Amendment protection.[9]

Assuming *arguendo* that Ceballos's limited audience and purportedly erroneous statements diminish the weight of his First Amendment interests, the individual defendants do not meet their burden under *Pickering* because they offer no explanation as to how Ceballos's memorandum to his supervisors resulted in inefficiency or office disruption. Ceballos tried to address the problem initially by reporting the matter to his supervisors, obviously an appropriate way of seeking a responsible solution. *Cf., Moran,* 147 F.3d at 849-50 (holding *Pickering* factors favored defendant where deputy commissioner charged with carrying out commissioner's public outreach program criticized program and refused to carry it out, thereby undermining commissioner's ability to implement policy initiative and disrupting workings of office); *Pool,* 297 F.3d at 908-09 (holding *Pickering* factors favored defendants where high-profile employee of the sheriff's office, who

employee's good-faith whistleblowing is retaliatory, and thus, impinges on First Amendment rights.

[9] Ceballos argues that the *Cusky* court's determination that the search warrant affidavit was acceptable does not show that his statements were incorrect. We may assume that Ceballos's statements were in error, however, because ultimately, for purposes of summary judgment, given the good-faith nature of his statements and the other factors we consider in the *Pickering* balance, our result is no different whether or not Ceballos's assertions were correct.

worked in a ("'confidential, policy-making, or public contact role,'" made crude public comments regarding the sheriff that detrimentally affected the workings of the office) (quoting *Moran*, 147 F.3d at 846). As the defendants recognize, Ceballos was doing his job by investigating allegations of law enforcement misconduct in a case being prosecuted under his direction and reporting those that appeared to be meritorious to his supervisors. It is difficult to imagine how the performance of one's duties in this manner could be disruptive or inefficient – much less how any such "disruption" or "inefficiency" could outweigh the public's interest in the exposure of corrupt or unlawful practices in the Sheriff's Department. *See Hufford*, 249 F.3d at 1149 ("'[I]t would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.'") (quoting *Roth*, 856 F.2d at 1407-08)); *Johnson*, 48 F.3d at 427 ("[T]he County does not have a legitimate interest in covering up mismanagement or corruption and cannot justify retaliation against whistle-blowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure.") In any event, because the defendants have failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office, there is little for us to weigh in favor of the individual defendants under *Pickering*.

In sum, Ceballos's speech addressed a matter of public concern and his interest in the speech outweighed the defendants' administrative interests. Thus, we hold that, for summary judgment purposes, his speech was protected by the First Amendment.

B. The Constitutional Right Was Clearly Established

Even if Ceballos's speech is constitutionally protected, the defendants are nonetheless entitled to qualified immunity if the constitutional right was not clearly established at the time of the alleged violation.

A right is "clearly established" when the contours of the right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151. To determine whether qualified immunity applies, we must consider the application of the right in the specific context in question. *Brewster*, 149 F.3d at 977. This does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," however, but rather that "in the light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (internal quotation marks and citations omitted). Indeed, "'[o]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.'" *Id.* at 741, 122 S.Ct. 2508. In order to find that the law was clearly established, then, "we need not find a prior case with identical, or even 'materially similar,' facts." *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136-37 (9th Cir.2003) (quoting *Hope*, 536 U.S. at 741, 122 S.Ct. 2508). Instead, we must "determine whether the preexisting law provided the defendants with 'fair warning' that their conduct was unlawful." *Id.* at 1137 (quoting *Hope*, 536 U.S. at 741, 122 S.Ct. 2508).

The individual defendants argue that it was not clearly established that (1) an employee can speak on a

matter of public concern when he speaks pursuant to a job responsibility or (2) under the *Pickering* balancing test, Ceballos's statements were protected by the First Amendment.

As discussed above, however, as early as 1988 we held that speech made pursuant to an employment duty can be a matter of public concern. *See, e.g., Roth,* 856 F.2d at 1406; *Pool,* 297 F.3d at 908. The defendants' argument that the law in this respect was not clearly established is therefore without merit.

With respect to the *Pickering* test, the defendants contend that the *Pickering* balance favors them because Ceballos spoke only to Sundstedt, not to a larger or public audience, and the statements were determined by the *Cusky* court to be false. Yet even if Ceballos spoke only to Sundstedt, and even if the statements were incorrect (there is no evidence that they were made in bad faith or recklessly), the defendants make no assertion that Ceballos's speech caused actual, or even potential, office disruption or inefficiency. Thus, this argument fails as well.

We have recognized that, although the qualified immunity inquiry in a *Pickering* balancing case is context-specific, *see Brewster,* 149 F.3d at 979-80, where the balancing factors weigh heavily in favor of the employee the law is clearly established, and qualified immunity is therefore unavailable. *See Gilbrook,* 177 F.3d at 867-70; *Lytle v. Wondrash,* 182 F.3d 1083, 1089 (9th Cir.1999). Moreover, "there is a series of cases in the Ninth Circuit establishing that the public's interest in learning about illegal conduct by public officials and other matters at the core of the First Amendment protection outweighs a [public] employer's interest in avoiding a mere *potential*

disturbance to the workplace." *Keyser,* 265 F.3d at 748 (discussing our previous holdings including *Gilbrook,* 177 F.3d at 867-70, *Roth,* 856 F.2d at 1403-08, and *Johnson,* 48 F.3d at 425-28). Given our prior cases, therefore, the defendants were on fair notice that the *Pickering* balance strongly favored Ceballos. The law, therefore, was clearly established in this respect as well.DECIDED:

C. The Officials' Acts Were Not Objectively Reasonable

There is one more hurdle that Ceballos must clear. Whether or not the law was clearly established, Ceballos may not prevail if the official's "mistake as to what the law requires is [objectively] reasonable." *Saucier,* 533 U.S. at 205, 121 S.Ct. 2151. The individual defendants argue that their conduct was objectively reasonable because the undisputed evidence shows that all of the "employment decisions of which Plaintiff complained were undertaken for non-retaliatory reasons."

The defendants are mistaken. It is possible that they will be able to show at trial that the adverse acts Ceballos alleges were not taken in retaliation for his constitutionally protected speech. However, "[a]s with proof of motive in other contexts, this element of a First Amendment retaliation suit . . . involves questions of fact that normally should be left for trial." *Ulrich,* 308 F.3d at 979 (citing *Hunt v. Cromartie,* 526 U.S. 541, 552, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999)). They may not be resolved on summary judgment. At trial, the individual defendants will have the opportunity to refute Ceballos's evidence that they acted with a retaliatory motive, or to prove that they would have taken the same actions for other reasons even

in the absence of such a motive. *See Ulrich*, 308 F.3d at 976-77.

The individual defendants make no argument that, in light of our clearly established law, it was objectively reasonable for them to take the adverse employment actions against Ceballos on the basis of the retaliatory motives that he alleges they possessed. Nor could they. Retaliatory motives do not constitute a sound basis for employment decisions. Here, with all disputed factual questions resolved in favor of Ceballos and drawing all reasonable inferences in his favor, "the *Pickering* balancing so clearly weighs in favor of [Ceballos] that it was patently unreasonable for defendants to conclude that the First Amendment did not protect his speech." *Gilbrook*, 177 F.3d at 870.

The individual defendants' actions were not objectively reasonable. We therefore reject the qualified immunity defense.[10]

II. County Defendants and Sovereign Immunity

Ceballos next claims that the County of Los Angeles and Garcetti, in his official capacity as District Attorney of Los Angeles County, are liable for the alleged violation of his constitutional rights. The district court did not reach the merits of these claims; rather, it held that they were

[10] Although the district court did not reach the question, at oral argument the defendants asked us to hold that the undisputed facts show that Ceballos's speech was not a substantial or motivating factor causing the adverse employment actions taken against Ceballos. We are unable to do so. On the basis of the record before us, a reasonable jury could infer that Ceballos's speech was a substantial motivating factor.

barred (directly or indirectly) by the Eleventh Amendment to the United States Constitution, because the Los Angeles County District Attorney acted on behalf of the state when he took the actions of which Ceballos complains.

Counties are not entitled to sovereign immunity. *Eason v. Clark County School Dist.*, 303 F.3d 1137, 1141 (9th Cir.2002) (citing *Lincoln County v. Luning*, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890)). Here, however, the County can be held liable only if the District Attorney acted as a county officer. If the District Attorney was a state officer when he engaged in the acts of which Ceballos complains, he is entitled to Eleventh Amendment immunity (to the extent that he is sued in his official capacity) and the County cannot be held liable for those acts. Thus liability for both county defendants depends on the same question: whether the District Attorney acted on behalf of the state or the county. With that in mind, we now analyze the role of the District Attorney in relation to the proceeding before us.

Ordinarily, an official designated as an official of a county – as is the District Attorney of the County of Los Angeles – is a county official for all purposes. Some officials, however, serve two masters. Among them are California's 58 district attorneys: While these officers are elected by and for the counties, they prosecute cases on behalf of the state. In such mixed circumstances, we determine whether the officer is a state or a county official by examining state law to determine whether the particular acts the official is alleged to have committed fall within the range of his state or county functions. *McMillian v. Monroe County*, 520 U.S. 781, 785-86, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997). 3469 The California Supreme Court has held that a district attorney is a state official when he acts

as a public prosecutor, while in other functions he acts on behalf of the county:

> He is at once the law officer of the county and the public prosecutor. While in the former capacity he represents the county and is largely subordinate to, and under the control of, the [county] board of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the authority and in the name of the people of the state.

Pitts v. County of Kern, 17 Cal.4th 340, 70 Cal.Rptr.2d 823, 949 P.2d 920, 932-33 (Cal.1998). The *Pitts* court thus concluded that a claim alleging prosecutorial misconduct is a claim against the state. *Id.* at 930-37; *see also Weiner*, 210 F.3d at 1026, 1030 (holding the San Diego County District Attorney acted on behalf of state in allegedly hiding exculpatory evidence from criminal defendant, while noting that its holding did not imply that "district attorneys in California are state officers for all purposes"). District attorneys performing investigatory and other functions, however, are officers of the county. *See, e.g., Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893, 906-10 (9th Cir.2002) (reviewing state constitution and statutes and concluding that district attorney and sheriff acted as county officials in obtaining and executing search warrant), *vacated on other grounds*, 538 U.S. 701, 123 S.Ct. 1887, 155 L.Ed.2d 933 (2003).

Whether the District Attorney acted on behalf of the county or the state thus turns on whether the personnel actions alleged by Ceballos are part of the District Attorney's prosecutorial functions or whether he was performing administrative or other non-prosecutorial duties. The California courts have not defined the precise characteristics that distinguish a district attorney's prosecutorial

function from his other functions. As *Bishop Paiute Tribe* noted, however, a similar issue as to whether a prosecutor was acting in his prosecutorial capacity, as opposed to an administrative or investigative capacity, arises in determining whether he is entitled to absolute or qualified immunity under § 1983; we may look for guidance to cases addressing that issue. *See id.* at 908-09.[11]

A state prosecutor "is entitled to absolute immunity from liability under § 1983 for violating a person's federal constitutional rights when he or she engages in activities 'intimately associated with the judicial phase of the criminal process.'" *Broam v. Bogan*, 320 F.3d 1023, 1028

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[11] *Bishop Paiute Tribe*, *Pitts*, and *Weiner* all considered whether an officer acted on behalf of the state or the county for the purpose of establishing whether there could be liability under § 1983. Whereas political subdivisions of states, along with their agencies and officials are "person[s]" for the purpose of § 1983 liability, *see Monell*, 436 U.S. at 663, 98 S.Ct. 2018; 18 U.S.C. § 1983 (providing only that "person[s] . . . shall be liable"), states, state agencies, and state officials sued in their official capacity are not. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Although these cases did not consider the Eleventh Amendment issue we address here, the same distinction, between states and state officials on the one hand and counties and county officials on the other, controls the outcome under both analyses. *Cf. Aguon v. Commonwealth Ports Auth.*, 316 F.3d 899, 901-02 (9th Cir.2003) (applying factors from Eleventh Amendment analysis to determine whether an entity is arm of the state and therefore not a "person" under § 1983); *Cortez v. County of Los Angeles*, 294 F.3d 1186, 1188 (9th Cir.2002) ("[A] state and its officials sued in their official capacity are not considered 'persons' within the meaning of § 1983, due to the sovereign immunity generally afforded states by the Eleventh Amendment."). Similarly, the issue whether an officer is acting as a prosecutor for purposes of determining absolute or qualified immunity in § 1983 actions involves the same considerations as the issue whether he is acting as a prosecutor for purposes of determining sovereign immunity under the Eleventh Amendment. Thus, the § 1983 cases we discuss guide our decision here.

(9th Cir.2003) (quoting *Imbler v. Pachtman,* 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)). Only qualified immunity is available, however, to a prosecutor "performing investigatory or administrative functions." *Broam,* 320 F.3d at 1028. While the line between the functions is not entirely clear, *id.* at 1029, it is clear that "absolute prosecutorial immunity [is justified] only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Burns v. Reed,* 500 U.S. 478, 494, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). Actions for which there is absolute immunity include, for example, preparing and filing an information and a motion for an arrest warrant, *Kalina v. Fletcher,* 522 U.S. 118, 129, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997), initiating a prosecution, *Imbler,* 424 U.S. at 430, 96 S.Ct. 984, and withholding evidence during trial, *id.* at 431-32 n. 34, 96 S.Ct. 984. Actions that are not directly related to the judicial process do not give rise to absolute immunity, even if they occur after a prosecution is initiated. *Broam,* 320 F.3d at 1031. Thus, when a prosecutor acts as an investigator, *Buckley v. Fitzsimmons,* 509 U.S. 259, 274 n. 5, 113 S.Ct. 2606, 125 L.Ed.2d 209, testifies as a witness in an *ex parte* proceeding, *Dela Cruz v. Kauai County,* 279 F.3d 1064, 1067 (9th Cir.2002), or performs administrative duties, *Broam,* 320 F.3d at 1029, he receives only qualified immunity.

Ceballos alleges that the District Attorney's Office took several retaliatory actions against him: that he was (1) demoted from his position of calendar deputy; (2) given the choice to transfer to the El Monte Branch or to remain in Pomona but be re-assigned to filing misdemeanors (a position usually assigned to junior deputy district attorneys); (3) removed from prosecuting the only murder case

he was handling at the time; (4) precluded from handling future murder cases; and (5) denied a promotion.[12]

Among these alleged acts of retaliation, only the removal of Ceballos from a particular murder case he was handling fell within the District Attorney's prosecutorial function, because it alone is "intimately associated with the judicial phase of the criminal process." *Id.* at 1028. With that one exception, Ceballos does not complain of actions taken as part of a prosecution. He does not argue, for example, that there was a violation when the District Attorney's Office decided to pursue the *Cusky* prosecution despite his recommendation that it be dismissed. Neither does he complain of his removal from the *Cusky* case. Rather he challenges Garcetti's personnel decisions concerning his promotion, demotion, and transfer-decisions squarely within the District Attorney's administrative function. Even the decision not to reassign Ceballos to future murder cases was a personnel decision, and was unrelated to any particular prosecution or ongoing judicial proceeding. Indeed, the defendants' own arguments lend support to our conclusion that the alleged retaliatory acts were not prosecutorial in nature: The individual defendants, including Garcetti, do not seek dismissal on the basis of absolute immunity for the acts they allegedly took against Ceballos. Instead, they seek qualified immunity, implicitly acknowledging that the actions were not prosecutorial, but administrative.

[12] While it is not altogether clear, we assume that Ceballos's allegations that Najera and Sundstedt were "rude and hostile" towards him, gave him the "the silent treatment," and "threatened" him are not intended as allegations of independent harms but rather as support for his assertion that the other alleged harms were retaliatory in nature.

In sum, the District Attorney's Office and its then-head, Garcetti, were carrying out their county functions when they allegedly engaged in the retaliatory acts Ceballos describes. Garcetti is, therefore, not entitled to Eleventh Amendment immunity, and thus the County may not seek summary adjudication on the ground that he was acting on behalf of the state. Because the district court did not decide any other issues pertaining to the county defendants, we decline to do so here. Accordingly, we reverse.

III. Intentional Infliction of Emotional Distress

Having granted final judgment against Ceballos with respect to all of his federal claims, the district court declined to exercise jurisdiction over his state law claim of intentional infliction of emotional distress. Because we reverse the district court's judgment on the federal claims, we reverse its determination as to the state law claim as well.

CONCLUSION

For the foregoing reasons, we reverse the district court and remand for further proceedings.

REVERSED and REMANDED.

O'SCANNLAIN, Circuit Judge, specially concurring:

I write separately because although I concur in the court's opinion that *Roth v. Veteran's Administration of the United States,* 856 F.2d 1401 (9th Cir.1988), controls the result, I believe that *Roth* was wrongly decided and that it

ought to be overruled, perhaps even by our court's rehearing the present case en banc.

I

As we recently recounted, *see Roe v. City of San Diego,* 356 F.3d 1108, 1114-15 (9th Cir.2004), for much of this Nation's history, our courts generally accepted then-Judge Holmes's immoderately narrow view of the First Amendment rights of public employees: "[A constable] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517 (Mass.1892). Beginning in the mid-part of the twentieth century, in response to the proliferation of loyalty oaths and other grave restrictions on the expressive and associational rights of public employees, the Supreme Court dramatically began to cast aside the Holmesian logic. *See, e.g., Keyishian v. Board of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) (invalidating state statutes denying public employment on the basis of membership in the Communist Party or other subversive political organizations); *Cramp v. Board of Public Instruction,* 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961) (invalidating state loyalty oath requiring state employees to deny membership in the Communist Party and to refuse to "lend aid, support, advice, counsel or influence to the Communist Party"); *Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952) (invalidating loyalty oath prohibiting membership in a "communist front" or other "subversive" organization).

The Supreme Court's burgeoning recognition of public employees' First Amendment rights reached its first apex

in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), where the Court held unconstitutional the dismissal of a public school teacher who had published in his local newspaper a letter that sharply criticized the Board of Education and superintendent of schools. Striving to accommodate the expressive rights of public employees with the special needs of the government in its capacity as a day-to-day employer, the *Pickering* Court explained:

> The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 568, 88 S.Ct. 1731 (citation and quotations omitted). Applying its test to the case at bar, the Court concluded that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574, 88 S.Ct. 1731.

Over the course of the ensuing decade and a half, lower courts struggled to define the terms of, and to apply, *Pickering's* amorphous balancing test. In apparent recognition, the Supreme Court attempted to clarify its doctrine in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75

L.Ed.2d 708 (1982). There, the Justices confronted a challenge brought by a public employee who claimed that her First Amendment rights had been violated when she was fired after having circulated an internal office questionnaire that (in the Court's words) was "most accurately characterized as an employee grievance concerning internal office policy." *Id.* at 154, 103 S.Ct. 1684. Focusing largely on whether the employee's speech touched on matters of "public concern" as "determined by the content, form, and context of a given statement," *id.* at 147-48, 103 S.Ct. 1684, the Court also took pains to recognize that "[t]he repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental," *id.* at 143, 103 S.Ct. 1684, and it

> h[e]ld only that when a public employee speaks not *as a citizen* upon matters of public concern, but instead *as an employee* upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147, 103 S.Ct. 1684 (emphasis added).

II

It was against this backdrop that in *Roth*, a three-judge panel of our court held that when a public employee speaks on matters of public importance, his or her speech falls automatically within the protective ambit of the First

Amendment.[1] *Roth*, 856 F.2d at 1406 ("Both the content and context of Roth's speech reveal that it concerned matters of public importance, and thus deserves protection."); *see also id.* ("Roth's speech concerned matters of public importance and thus was protected."). Yet in so holding, *Roth* minimized – indeed, it entirely ignored – the significance of *Connick's* distinction between speech offered by an public employee acting *as an employee* in carrying out his or her ordinary employment duties and speech spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import. Instead, *Roth* asserted that the relevant constitutional inquiry focuses solely on the "point of the speech in question: Was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?" *Roth*, 856 F.2d at 1405 (*quoting Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir.1987)) (*quoting Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir.1985)). As the majority today reiterates,

[1] Of course, the fact that certain speech by public employees may fall within the scope of the First Amendment does not mean that governmental constraints on such speech are unconstitutional *per se*. As we explained in *Brewster v. Bd. of Educ.*, 149 F.3d 971, 979 (9th Cir.1998) (citations and quotations omitted):

> [T]he fact that an employee's expression touches on an issue of public concern does not automatically entitle him to recovery. The public concern prong is a necessary, but not a sufficient, condition of constitutional protection. It merely brings the claim within the coverage of the First Amendment, and thus ensures that a court will test the reasons for restriction against first amendment standards. In determining whether speech involving a matter of public concern merits constitutional protection, courts engage in a balancing test, first announced in *Pickering*. . . .

Roth's formulation led inexorably to the conclusion that "it is only when it is clear that . . . the information would be of *no* relevance to the public's evaluation of the performance of governmental agencies that speech of government employees receives no protection under the First Amendment." Maj. Op. at 1174 *(quoting Ulrich v. City & County of San Francisco*, 308 F.3d 968, 978 (9th Cir.2002)) (quotation omitted) (emphasis in original).

That conclusion – that the First Amendment encompasses *any* speech by a public employee that touches upon matters of public importance, notwithstanding what might best be described as the "role" of its speaker – is at odds with the Supreme Court's instruction in *Connick*. *Connick* teaches us that the relevant constitutional distinction is not merely between speech touching on matters of public significance and speech that does not, but between speech spoken "*as a citizen* upon matters of public concern [and that offered] *as an employee* upon matters only of personal interest." *Id.* at 147, 103 S.Ct. 1684 (emphasis added); *see also United States v. Nat'l Treas. Employees Union*, 513 U.S. 454, 465-466, 115 S.Ct. 1003, 130 L.Ed.2d 964 (highlighting that "with few exceptions, the content of respondents' messages has nothing to do with their jobs" and that virtually no aspect of the claimants's expressive activity "has any relevance to their employment," and pointedly observing that "[W]e have applied *Pickering's* balancing test only when [as in this case] the employee spoke '*as a citizen* upon matters of public concern' rather than '*as an employee* upon matters only of personal interest.'") (quoting *Connick* with its own added emphasis); *see also id.* at 480, 486, 115 S.Ct. 1003 (O'Connor, J., dissenting in part) (arguing that the relevant speech restrictions were unconstitutional only insofar as they related to "expressive

activities that bear no nexus to Government employment," and suggesting that the relevant regulations should be severed because similar concerns did not apply where "the subject matter is directly related to the individual's official duties"). *Roth* thus collapses a critical dimension of *Connick's* two-pronged inquiry: By focusing only on *Connick's* public concern/purely personal interest axis, *Roth* improperly quashes the controlling caselaw's accompanying distinction between an employee's viewpoint-laden personal speech and his or her ordinary job-related speech.

III

In fairness to the *Roth* court, *Connick* did not fully rationalize the distinction it drew between speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import. Nor, for the most part, have the six other circuits which – in contrast to this court – at various points reiterated the importance of *Connick's* citizen speech-employee speech distinction. *See, e.g., Gonzalez v. City of Chicago,* 239 F.3d 939, 942 (7th Cir.2001) ("[T]here are still limits in public employment as to what can be fairly characterized as speech 'as a citizen' on a matter of public concern. Speech exercised by a public employee in the course of his employment will rarely fit the mold of private speech by a citizen."); *Urofsky v. Gilmore,* 216 F.3d 401, 407 (4th Cir.2000) (en banc) ("[C]ritical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is 'made primarily in the [employee's] role as citizen or primarily in his role as employee.'") (*quoting Terrell v. Univ. of Tex. Sys. Police,* 792 F.2d 1360, 1362 (5th

Cir.1986) (alteration in original)); *Buazard v. Meridith,* 172 F.3d 546, 548-49 (8th Cir.1999) ("Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment. . . . [T]here is no indication that [the plaintiff], in making, or refusing to change, his statements, was taking any action as a concerned citizen, rather than simply as an employee following orders or refusing to follow them."); *Gillum v. City of Kerrville,* 3 F.3d 117, 120-21 (5th Cir.1993) ("[W]e d[o] not focus on the inherent 'importance' of the subject matter of the speech, but on the extent to which the terminated employee spoke as a citizen or employee. . . ."); *Thomson v. Scheid,* 977 F.2d 1017, 1020 (6th Cir.1992) ("First Amendment protection extends to a public employee's speech when he speaks as a citizen on a matter of public concern, but does not extend to speech made in the course of acting as a public employee."); *Koch v. Hutchinson,* 847 F.2d 1436, 1442-43 (10th Cir.1988) (en banc) (declining "to establish a per se rule exempting speech made in the course of an employee's official duties," but viewing "that fact as militating against a finding that the speech addressed matters of public concern" and noting that "it is a significant factor in the balancing required under *Pickering*").[2] Notwithstanding

[2] Admittedly, the failure of these courts fully to rationalize their recognition of *Connick's* distinction among the roles of a public-employee speaker has in some instances emboldened subsequent panels putatively to distinguish these cases, or otherwise to attempt to narrow the scope of their holdings. *Cf. Taylor v. Keith,* 338 F.3d 639, 643-46 (6th Cir.2003); *Delgado v. Jones,* 282 F.3d 511, 519 (7th Cir.2002); *Kennedy v. Tangipahoa Parish Library Bd. of Control,* 224 F.3d 359, 367-376 (5th Cir.2000); *Dill v. City of Edmond,* 155 F.3d 1193, 1202 (10th Cir.1998). At times, these efforts have been particularly thin, *e.g., Delgado,* 282 F.3d at 519 ("[Officer] Delgado's communications with his superiors were designed not only to convey information of possible crimes, but

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the relative opacity of *Connick's* explanation for its differentiation between citizen and employee speech, however, there is a strong First Amendment basis for its having drawn such a distinction.

A

While it has rarely been stated explicitly by the Supreme Court, the implicit premise underlying the First Amendment's hostility toward viewpoint-driven rules abridging the freedom of speech is that such constraints impermissibly infringe upon individuals' freedom of choice to express *their personal* opinions or to otherwise express *themselves*. As the Court put the point in *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75-76, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (emphasis added) (internal citations omitted):

> [T]here are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform *their beliefs and associations* to some state-selected orthodoxy. The First Amendment is not

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also *additional facts* that were relevant to the manner and scope of any subsequent investigation.") (emphasis in original); at others, they have provoked great consternation within those courts. *E.g., Teague v. City of Flower Mound*, 179 F.3d 377, 383 (5th Cir.1999) ("Moreover, the rule of orderliness forbids one of our panels from overruling a prior panel; to the extent that *Wilson's* language contradicts the 'primary role'/balancing test of *Terrell* (and *Moore*), decided years earlier, it is of no effect."), *ironically, itself disregarded by Kennedy*, 224 F.3d at 370 n. 13 ("[T]he rule of orderliness has little persuasive force when the prior panel decision at issue conflicts with a Supreme Court case to which the subsequent panel decision is faithful.").

In any event, such deep confusion within the circuits over the scope of *Connick* – indeed, over the scope of their own cases interpreting *Connick* – seems a clarion call for higher review.

> a tenure provision, protecting public employees from actual or constructive discharge. The First Amendment prevents the government . . . from wielding its power to interfere with its *employees' freedom to believe and associate, or to not believe and not associate.*

See also Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) ("For at least a quarter century, this Court has made clear that . . . the government . . . may not deny a benefit to a person on a basis that infringes *his* constitutionally protected interests – especially *his interest in freedom of speech*. . . . [M]ost often we have applied this principle to denials of public employment.") (emphasis added).

The problem is that when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right. Instead, their speech is, in actuality, the State's. I do not dispute the court's characterization of the relevant facts of this case – which it presents, as it must, in the light most favorable to Ceballos, *see Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir.2003) – but I believe that actually quoting Ceballos's own statement of the operative facts may be particularly illustrative here. In his opposition to the defendants' motion for summary judgment below, Ceballos described as follows the basis for the speech that he now claims to fall within the protections of the First Amendment:

> Pursuant to his duties as a prosecutor, [Ceballos] wrote a memo expressing his concerns about the veracity of the officers in [*People v. Cuskey*]. He then informed his supervisors he intended to comply with his duties under *Brady v. Maryland*, [373 U.S. 83, 83

S.Ct. 1194, 10 L.Ed.2d 215 (1963)], which required him to turn his memo over to defense counsel.

Plaintiff's Statement in Opposition to Defendants' Separate Statement of Uncontroverted Facts and Conclusions of Law at 4. Counsel for plaintiff reiterated that description of the facts at oral argument:

> Ceballos prepared a memorandum describing [the results of his investigation] and told his supervisors that he should disclose that information to the defense under *Brady v. Maryland* as he is required to do so. This is a prosecutorial function that he's engaged in at this time, when he's doing what he is supposed to do.

As these statements indicate, Ceballos had no *personal* stake (other than in doing his job well), and no cognizable First Amendment interest, in the speech for which he now seeks protection – his performance of the basic communicative duty *Brady* imposes on "the prosecution." *See Brady,* 373 U.S. at 87, 83 S.Ct. 1194.[3] Indeed, as

[3] Plaintiff's own characterization of the relevant conduct – "This is a prosecutorial function that [Ceballos is] engaged in at this time, when he's doing what he is supposed to do" – more than effectively disposes of the majority's suggestion that Ceballos may not have been acting in a governmental capacity with respect to the speech giving rise to this litigation. *Cf.* Maj. Op. at 1175-76 n. 5. To the extent the majority's response strains narrowly to construe Ceballos's repeated statements about his *Brady* obligations – as referring merely to his internal office communications – such an unduly constricted construction is utterly belied by the reality of this lawsuit. Let us not forget that Ceballos's action is predicated upon an allegation of retaliation that supposedly stemmed from the facts that: pursuant to *Brady,* he informed defense counsel that he thought the *Cuskey* search warrant affidavit contained false statements; turned his *Brady* memorandum over to the defense; and eventually testified about the contents of that *Brady* memorandum. *See* Maj. Op. at 1171. In each of those instances, Ceballos was simply

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the Supreme Court has explained, "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government. A [statement] made by one attorney must be attributed, for these purposes, to the Government." *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (*citing Restatement (Second) of Agency* § 272). Of course, "the Government" has no First Amendment rights. Only individuals do.

B

Roth's extension of First Amendment protections to such routine, required job-related activity effectively has – no less than an extension of such safeguards to the personnel grievances at issue in *Connick* would have – "plant[ed] the seed of a constitutional case" in every task that every public employee ever performs, every time that any public employee merely does "what he is supposed to do." *Connick,* 461 U.S. at 149, 103 S.Ct. 1684. At bottom, after all, everything a public employee does in the course of carrying out the requirements of his or her job ultimately is connected to the public interest and relevant to citizens' "making informed decisions about the operation of their government," *Coszalter,* 320 F.3d at 973. *Terrell,* 792 F.2d at 1360 ("Because almost anything that occurs within a public agency could be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee."); *Gillum,* 3 F.3d at 120-21 ("[Our] focus on the hat worn by the employee when speaking rather than upon the 'importance' of the issue

"doing what he was supposed to do" as a deputy district attorney carrying out non-discretionary quintessentially "prosecutorial function[s]."

reflects the reality that at some level of generality almost all speech of state employees is of public concern.").

Indeed, with *Roth* as precedent and now *Ceballos* on the books, what federal or state employment-based decision can possibly evade intrusive federal constitutional review? Suppose that, instead of retaining private counsel as it has here, the County had provided its own staff attorney representation. Suppose further that the deputy county counsel assigned to defend this case had (just like the majority) quite mistakenly, but also quite sincerely, come to the conclusion that Ceballos indeed has a viable First Amendment retaliation claim and, consequently, went so far as to file a brief in this court not only agreeing with the claims made by Ceballos's counsel, but providing additional arguments to support them. Could the County discipline its counsel without fear of being hauled into federal court to defend itself against allegations of having committed a constitutional violation? Evidently not – for as the majority makes pellucid today, *Roth* and its progeny would enable such counsel plausibly to claim some personal stake in the message conveyed by that brief. This is precisely the kind of absurd result that *Connick* sought to avoid by stressing the distinction between employee and citizen speech:

> The repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter.

Connick, 461 U.S. at 143, 103 S.Ct. 1684.

C

Finally, holding as *Roth* did that the First Amendment protects speech offered by a public employee in the course of carrying out his or her ordinary job responsibilities "creates a fundamental and unnecessary schism" between the Supreme Court's caselaw addressing speech by public employees and its caselaw addressing speech that otherwise is government-funded or state-sponsored. *Urofsky*, 216 F.3d at 408 n. 6. Consider the Supreme Court's instruction in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (emphasis added):

> [W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed *when it is the speaker or when it enlists private entities to convey its own message.* In the same vein, in *Rust v. Sullivan*, [500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991)], we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to *its own program.* We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. 500 U.S. at 194, 111 S.Ct. 1759. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

See also Rust, 500 U.S. at 198-99, 111 S.Ct. 1759 ("[E]mployees remain free . . . to pursue abortion-related activities when they are . . . acting as private individuals."). Writing for the *Urofsky* en banc court, Judge Wilkins adeptly explained the appropriately analogous nature of these two lines of authority:

> In both situations – public employee speech and government-funded speech – the government is entitled to control the content of the speech because it has, in a meaningful sense, "purchased" the speech at issue through a grant of funding or payment of a salary. The limits of government control are similar in both types of cases, as well: Just as the government as provider of funds cannot dictate the content of speech made outside the confines of the funded program, *see* [*Rust v. Sullivan*, 500 U.S. 173,] at 198, 111 S.Ct. 1759, 114 L.Ed.2d 233, the government as employer is restricted in its ability to regulate the speech of its employees when they speak not as public employees, but as private citizens on matters of public concern.

Urofsky, 216 F.3d at 408 n. 6. There simply is no plausible basis for *Roth's* holding that the government may not exercise control over its employees' routine job-related speech, when it assuredly may exercise precisely such control over the speech it subsidizes through its funding decisions.

D

The majority's response is long on policy, but short on the law. Its argument is seductively simple: Because whistle-blowers play an important role in rendering government accountable, the First Amendment must

protect their whistleblowing activities. Maj. Op. at 1174-76. How can anyone disagree with that general principle? Those who "blow the whistle" on government corruption or mismanagement do deserve reasonable legal protections, and such protections most certainly play an important role in discouraging official misfeasance by facilitating wider public exposure of improper conduct – and the identities of those miscreants responsible for it.

Indeed, were I member of Congress charged with making laws that promote sound public policy – and not merely a federal judge charged with interpreting the Constitution – I might well have voted in favor of legislation like the federal Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C.), as modified by the Whistleblower Protection Act of 1989, Pub.L. No. 101-12, 103 Stat. 16 (codified in scattered sections of 5 U.S.C.). It provides, *inter alia*, that no federal

> employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall . . . take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of –
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences . . . a violation of any law, rule, or regulation. . . .

5 U.S.C. § 2302(b)(8) (enumeration omitted).

Or, were I a state legislator, perhaps I would have voted to enact a law like the California Whistleblower Protection Act, Cal. Gov't Code § 8547 *et seq.* It imposes severe criminal liability upon, and establishes a private

cause of action for both actual and punitive damages against, "[a]ny person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure," Cal. Gov't Code § 8547.8(b) & (c), which state law in turn defines as:

> any good faith communication that discloses or demonstrates an intention to disclose information that may evidence . . . any activity by a state agency or by an employee that is undertaken in the performance of the employee's official duties . . . and that is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty. . . .

Cal. Gov't Code § 8547.2(b) & (d). How strange it must now be for the hundreds, if not the thousands, of legislators throughout this country who have voted to enact or to retain such laws now to discover that their votes were essentially meaningless – that the First Amendment already provided public employees with protections coextensive with, and in many respects even greater than those purportedly conferred by, the legislation they crafted and helped shepherd through their state legislative processes. *See, e.g.,* Alaska Stat. 39.90.100-.150; Ariz.Rev.Stat. § 38-532; Haw.Rev.Stat. §§ 378-62 & 378-63; Idaho Code §§ 6-2101-2109; Or.Rev.Stat. §§ 659A.200-.224; Wash. Rev.Code §§ 42.40.010-.910 & 42.41.010-.902.

This case – and the doctrine it ratifies – thus implicates more than the too-common tendency of well-intentioned jurists to squeeze a policy-oriented square peg

into a round constitutional hole. For despite the majority's paean "to the orderly functioning of the democratic process," Maj. Op. at 1175, I fear that *Roth* and its progeny actually pose something of a challenge to the concept of representative democracy itself. More than one hundred years ago, James Bradley Thayer explained:

> The exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden [their] sense of moral responsibility. It is no light thing to do that.

James Bradley Thayer, *John Marshall* 103-04, 106-07 (1901), *quoted in* Alexander Bickel, *The Least Dangerous Branch* 22 (2d ed.1986). In this case, of course, the majority has not struck down an unwise enactment; instead, it has rendered utterly superfluous a bevy of wise ones. With such Platonic Guardians,[4] who needs elected representatives at all?

E

Properly understood, *Connick* teaches that although speech uttered by public employees must address an issue of public import in order to come within the protective shelter of the First Amendment, satisfaction of such a

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[4] *See* Learned Hand, *The Bill of Rights* 70 (1958).

virtually necessary condition is not by itself sufficient to trigger constitutional constraints on governmental action. Instead, employee speech solicits the protection of the First Amendment only when it also results from the employee's decision to express his or her *personal* opinions – that is, those views he or she holds *as a citizen* and not as a public employee. The First Amendment, in short, does not protect public employees' routine and required speech on behalf of the government.

IV

Our jurisprudence concerning the free speech rights of public employees is now frayed at both ends. While the panel's decision in this case was still pending, another three-judge panel of this court ruled that a police officer's sale of home videos depicting him "alone, with his face partially masked, taking off a generic police uniform and masturbating," *see Roe*, 356 F.3d at 1110, fell sufficiently within the ambit of the First Amendment that the City of San Diego's decision to terminate his employment was subject to balancing under *Pickering* and *Connick*. Remarkably, that panel so ruled notwithstanding the fact that such pornographic displays "may not be honestly considered 'as relating to any matter of political, social, or other concern to the community.'" *Roe*, 356 F.3d at 1128 (Wardlaw, J., dissenting) (*quoting Connick*, 461 U.S. at 146, 103 S.Ct. 1684).

Between *Roe* and *Roth*, the Ninth Circuit now provides that a public employee's speech will be given some degree of First Amendment protection even when it is not based in some personal interest (as opposed to that of the government itself) and even if it fails to touch upon

matters of public import (as opposed to those that are purely private). With this lethal combination, the twin pillars of *Pickering* and *Connick* – that speech by public employees must stem *both* from some individual interest *and* address a matter of public import in order to merit constitutional protection – have been felled.

While the court quite properly applies *Roth* as binding precedent in this case, the time has come for us to reappraise our jurisprudence concerning the free speech rights of the publicly-employed and the scope of legitimate governmental regulation in its capacity as employer. Because *Roth* is inconsistent with *Connick's* careful differentiation between public employees' speech as citizens and speech in their role as employees, I believe that *Roth* should be overruled – if not by our court sitting en banc, then, in due course, by the Supreme Court, to steer this court's drifting First Amendment jurisprudence back to its proper moorings.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, v. GIL GARCETTI, et al., Defendants.	CASE NO. CV 00-11106 AHM (AJWx) ORDER GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING REMAINING CLAIMS (Jan. 30, 2002)

INTRODUCTION

Defendants Gil Garcetti, Frank Sundstedt and Carol Najera (collectively "Defendants") have filed a Motion for Summary Judgment, or, in the alternative, Summary Adjudication of Issues. Plaintiff Richard Ceballos's (alternatively "Plaintiff" or "Ceballos") Second Amended Complaint (SAC) alleges two claims against the defendants: (1) a section 1983 claim based on violations of his First and Fourteenth Amendment rights, and (2) a state law claim for intentional infliction of emotional distress (IIED).[1] As to Plaintiff's section 1983 claim, Defendants argue they are entitled to summary judgment under the doctrine of qualified immunity. As to Plaintiff's IIED claim, Defendants argue there is no evidence of either outrageous conduct

[1] The SAC names as Defendants the three individuals who bring this motion and the City of Los Angeles ("City"). However, neither the section 1983 claim nor the IIED claim – the sole remaining causes of action in the SAC – are brought against the City. As a result, Defendants' motion addresses the entirety of Plaintiff's action.

or severe emotional distress and they are entitled to immunity under California Government Code Section 821.6. Because the Court finds Defendants are entitled to qualified immunity as to Plaintiff's section 1983 cause of action, the Court GRANTS Defendants' motion as to that claim. In addition, as summary judgment in favor of Defendants is warranted on Plaintiff's sole federal cause of action, the Court declines to further exercise its supplemental jurisdiction over Plaintiff's remaining state law claim for Intentional Infliction of Emotional Distress (IIED). As a result, that claim is hereby DISMISSED without prejudice.

FACTS

Plaintiff has been employed as a Deputy District Attorney with the Los Angeles County District Attorney's Office ("DA's Office") since 1989. (Plaintiff's Statement of Genuine Issues ("SGI") ¶ 1). In 2000, when Plaintiff was assigned as a calendar deputy at the Pomona branch of the DA's office, he was approached by Richard Escobedo, a criminal defense attorney representing one of the defendants in the case of *People v. Cuskey* (SGI ¶ 2). Mr. Escobedo told Plaintiff that he believed the arresting deputies in the *Cuskey* case may have lied in the search warrant affidavit and requested that plaintiff review the case. (SGI ¶ 3). After speaking with Mr. Escobedo, Plaintiff reviewed the affidavit and other documentary evidence in the case, and he personally visited the crime scene. He determined that, at a minimum, the deputies had grossly misrepresented the truth. (SGI ¶ 4). Thereafter, Plaintiff discussed the matter with Defendant Frank Sunstedt, the then-Head

Plaintiff's immediate supervisor. (SGI ¶ 5). Both Najera and Sunstedt agreed there was a problem with the case. (*Id.*).

On March 2, 2000, Plaintiff prepared a memorandum setting forth a summary of his investigation and his conclusion that the affidavit was falsified and misleading, and recommending that the *Cuskey* case be dismissed. (SGI ¶ 6). The memorandum was sent to Defendant Sunstedt. (*Id.*). Upon reviewing the memorandum, Sunstedt recommended Plaintiff revise the document so that it was less accusatory of the deputies involved in the case. (SGI ¶ 7; Ceballos Depo. at 90 (Ex. 4, Pl.'s Appendix of Exhibits)). After the plaintiff complied with Sunstedt's request, Sunstedt contacted the Sheriff's Department Industry Station and requested a meeting to review the matter.[2]

On March 9, 2000, a meeting regarding the *Cuskey* case was held in Mr. Sunstedt's office. (SGI ¶ 9). The meeting was attended by several representatives of the Sheriff's Department, including the deputy sheriff who prepared the search warrant affidavit, as well as Plaintiff and Defendants Sunstedt and Najera. (SGI ¶ 9). After the meeting, Sunstedt was no longer sure that dismissal of the *Cuskey* case was appropriate, and decided the best course of action was to proceed with the Motion to Traverse the warrant which had already been filed by the defense. (SGI ¶ 10). Plaintiff later testified at the Motion to Traverse hearing, and the Motion was

[2] Plaintiff contends the meeting was held in response to a demand by the Sheriff's Department. (SGI ¶ 8). However, that dispute is immaterial to the resolution of this motion.

denied. (SGI ¶ 14). Ultimately, one defendant was convicted at trial and two pled guilty.

Both during the March 9th meeting and thereafter, Plaintiff alleges the defendants subjected him to several acts of retaliation on account of his March 2, 2000 memorandum. (SAC ¶ 13). The alleged acts of retaliation are as follows:

1. At the March 9, 2000 meeting, Defendants Sunstedt and Najera did not object in any manner to the request of a Sheriff's Department Lieutenant that Plaintiff be removed from the *Cuskey* case. (SAC ¶ 14; SGI ¶ 17).

2. On March 14, 2000, Defendant Sunstedt allegedly told Plaintiff that he would no longer be a calendar deputy at the Pomona branch and would be reassigned as a trial deputy. (SAC ¶ 15; SGI ¶ 17).

3. On March 15, 2000, Defendant Najera informed the plaintiff that one of his murder cases would be reassigned to a lower level Deputy District Attorney. (SAC ¶ 17; SGI ¶ 18).

4. On March 16, 2000, Plaintiff reiterated to Defendant Najera his belief that the Sheriff's Department deputies had lied in the *Cuskey* matter. (SAC ¶ 17). Thereupon, Defendant Najera verbally reprimanded and berated Plaintiff and told him that his actions and statements would get Plaintiff "in trouble with the District Attorney's office." (SAC ¶ 17; Ceballos Depo. at 124-125).

5. Following the Motion to Traverse hearing on March 20, 2000, Defendants Sunstedt and Najera did not assign any further murder cases to Plaintiff. (SAC ¶ 18; SGI ¶ 19).

6. On August 25, 2000, Plaintiff was denied a promotion to Grade IV. (SAC ¶ 19; SGI ¶ 19).

7. In late August and early September, Defendant Najera informed Plaintiff that he could not remain in the Pomona branch unless he agreed to filing misdemeanors. (SGI ¶ 25; Ceballos Depo. at 24). Plaintiff was given a choice of filing misdemeanors in Pomona or working as a felony-filing deputy in the El Monte branch. (SGI ¶ 25). Because Plaintiff felt the Pomona position was demeaning, he did *not* choose between the two offers and was transferred to the El Monte branch on September 5, 2000. (SGI ¶ 26-27; Ceballos Depo. at 29).

Plaintiff contends the defendants took the above actions in retaliation for his March 2, 2000 memorandum regarding the *Cuskey* case. As such, the SAC alleges Defendants are liable under 42 U.S.C. § 1983 for violating Plaintiff's right to free speech under the First and Fourteenth Amendments to the United States Constitution (SAC ¶ 27). In addition, Plaintiff's Second Cause of Action alleges the actions of Defendants Sunstedt and Najera constitute IIED under California law. Defendants contend that there is no genuine issue for trial as to each claim.

MOTION STANDARD

Federal Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the initial burden of demonstrating

the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. *Id.* at 248. The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

"When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transportation Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. *See Celotex*, 477 U.S. at 325. Thus, "[s]ummary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.'" *Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 806, 119 S.Ct. 1597, 1603, 143 L.Ed.2d 966 (1999) (*citing Celotex*, 477 U.S. at 322).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the

adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." F. R. Civ. P. 56(e). Summary judgment will be entered against the non-moving party if that party does not present such specific facts. *Id.* Only admissible evidence may be considered in deciding a motion for summary judgment. *Id.; Beyene v. Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).

"[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and **all** justifiable inferences are to be drawn in [that party's] favor.'" *Hunt v. Cromartie*, 526 U.S. 541, 552, 119 S.Ct. 1545, 1551-52, 143 L.Ed.2d 731 (1999) (*citing Anderson*, 477 U.S. at 255). But the non-moving party must come forward with more than "the mere existence of a scintilla of evidence." *Anderson*, 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

DISCUSSION

I. THE DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S SECTION 1983 CLAIM.

Defendants argue they are entitled to summary judgment based on qualified immunity. In support of their claim, Defendants make three arguments: (1) Plaintiff's speech (the March 2, 2000 memorandum) was not protected by the First Amendment; (2) even if the Court finds

such speech was protected, the right violated was not "clearly established;" and (3) Defendants' actions were reasonable under the circumstances. Because the Court finds Defendants are correct that Plaintiff's speech was not entitled to First Amendment protection, and that even if it was, the First Amendment right allegedly violated was not "clearly established," the Court finds summary judgment is proper as to Plaintiff's Section 1983 claim.

A. Legal Standard for Qualified Immunity

Public officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). If the asserted constitutional right was not clear, the officials cannot be liable.

In *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156 (2001), the Supreme Court stated that in ruling on a summary judgment motion based on qualified immunity, the court must first ask: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* At 2156. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.*

B. Plaintiff's Speech Was Not Protected by the First Amendment

Whether speech is protected by the First Amendment is a question of law for the court to decide. *Connick v. Myers*, 461 U.S. 138, 148 fn. 7, 103 S. Ct. 1684 (1983). In determining whether a public employee's speech is protected by the First Amendment, the threshold inquiry is whether the statements at issue substantially address a matter of public concern. *Brewster v. Board of Education of the Lynwood Unified School District*, 149 F. 3d 971, 978 (9th Cir. 1998). If the statements do not address a matter of public concern, the First Amendment is not triggered and it is unnecessary to scrutinize the reasons for the employer's action. *Id.* However, even if the plaintiff is able to show that his statements were of public concern, that is not sufficient, standing alone, to warrant constitutional protection. *Id.* at 979. Rather, that showing merely ensures that the court will test the reasons for restriction against First Amendment standards. *Id.* In doing so, the court must engage in a balancing test; it must weigh the interests of the employee in commenting on matters of public concern with the interest of the State, as an employer, in promoting the efficiency of the public services it performs. *Id.* (*citing Pickering v. Bd. Of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731 (1968)). In balancing these considerations, the court must give government employers "'wide discretion and control over the management of [their] personnel and internal affairs.'" *Id.* (*quoting Connick*, 461 U.S. at 151, 103 S. Ct. 1684).

Here, Defendants argue that Plaintiff's March 2, 2000 memorandum is not entitled to First Amendment protection because it did not address a matter of public concern

and even if it did, the *Pickering* balancing test weighs in favor the defendants. (Mot. at 8-11).

"Speech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" *Johnson v. Multnomah County, Oregon*, 48 F. 3d 420, 422 (9th Cir. 1995) (*quoting Connick*, 461 U.S. at 146, 103 S. Ct. 1684). In determining whether an employee's speech involves a matter of public concern, the court must scrutinize the content, form and context of [the] statement. *Id.* (*citing Connick*, 461 U.S. at 146, 103 S. Ct. 1684).

Here, there are no significant factual disputes regarding the communication at issue – Plaintiff's March 2, 2000 memorandum regarding the *Cuskey* case. The memorandum set forth a summary of Plaintiff's investigation and his conclusion that the affidavit in *Cuskey* was falsified and misleading. (SGI ¶ 6). In addition, in the memorandum Ceballos recommended that the *Cuskey* case be dismissed (*Id.*). The memorandum was sent to Defendant Sunstedt and formed the basis for his decision to convene a meeting with representatives of the Sheriff's Department to discuss the case. (SGI ¶ 6, ¶ 8). There is no evidence in the record that plaintiff caused the memorandum to be delivered to anyone other than Defendants Sunstedt and Najera. (SGI ¶ 6-8).[3]

At first blush, and looked at from a perspective not shaped by judicial precedent, Plaintiff's speech clearly

[3] Plaintiff contends he sought to turn the memorandum over to defense counsel in the *Cuskey* case, for use on the Motion to Traverse the warrant. (SGI ¶ 7; Ceballos Depo. at 120-125). However, there is no evidence before the Court that he ever did so.

involved a matter of public concern. For reasons that need not be recited – the code word "Rampart" says it all – there can be no doubt that, in Southern California, police misconduct is a matter of great political and social concern to the community. In recent years, various local law enforcement agencies have been severely criticized for what many believe to be serious misconduct on the part of police officers. Plaintiff's speech dealt with an example of what he believed to be such misconduct.

Despite the intrinsic and important public interest in excluding perjured evidence from court proceedings, however, the mere significance of that issue does not establish that Ceballos's views addressed an issue of public concern for purposes of the First Amendment, because (as Defendants argue) he wrote it as part of his job. (Reply at 3). This argument is premised on *Connick, supra*, where the Supreme Court held that "when a public employee speaks not as a citizen upon matters of public concern but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 461 U.S. at 147.[4] In support of this argument, Defendants point to several cases in which federal courts have held that speech engaged in not

[4] On the other hand, a public employee does not forfeit his First Amendment rights merely because he arranges to communicate his views privately with his employer rather than express them publicly. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-16, 99 S. Ct. 693 (1979); *Johnson*, 48 F.3d at 425-26 (holding that the employee's statements addressed matters of public concern even where they were directed solely to the plaintiff's co-workers).

merely as a concerned citizen but within the scope of the plaintiff's employment does not address a matter of public concern, even if the incident that triggered the speech may itself be a matter of public concern. Thus, in *Gonzalez v. City of Chicago*, 239 F. 3d 939, 941 (7th Cir. 2001) the court held that where the scope of the plaintiff's ordinary job duties included writing reports regarding police misconduct those reports did not address matters of public concern. And in *Buazard v. Meridith*, 172 F. 3d 546, 548-49 ((8th Cir. 1999), the court ruled that two written statements by the plaintiff-police officer reflecting his conversations with certain witnesses and other officers and prepared at the request of the plaintiff's boss did not address matters of public concern. Finally, in *Thomson v. Scheid*, 977 F. 2d 1017, 1020 (6th Cir. 1992), a former investigator for the Erie County Department of Human Service ("Department") filed a section 1983 claim, alleging he was retaliated against for speaking out to his supervisors regarding his desire to personally file charges against a County Commissioner he had investigated. After a grand jury declined to file an indictment, plaintiff continued to press for filing charges but his supervisors warned him not to do so on account of his duty of confidentiality. *Id.* at 1019. Although the plaintiff argued that his comments addressed alleged fraud by a public official, the Sixth Circuit found the conversation with his supervisors to be substantially addressed to the nature of the plaintiff's duties as an employee of the Department. *Id.* at 1021.

In *Buazard* the speech at issue was expressly requested by the plaintiff's superior. Here, there are no facts demonstrating that Plaintiff's superiors requested him to prepare the memorandum. But to prepare such a memorandum, about possible perjured testimony, *was* part of

Ceballos's job, as in *Gonzalez*. Indeed, when Plaintiff looked into the defense lawyer's allegations and when he urged that the prosecution be dropped he was complying with his (and the government's) duties under the due process clause of the Fifth and Fourteenth Amendments not to introduce or rely on evidence known to be false. *See, Brady v. Maryland*, 373 U.S. 83, 87 (1963) (a prosecutor has duty to disclose evidence favorable to an accused and material to either guilt or punishment). A prosecutor has the duty to disclose exculpatory evidence even without being requested to do so. *Singh v. Prunty*, 142 F.3d 1157, 1161 (9th Cir.). And a memorandum the government prepares about a witness's integrity can be *Brady* material. *United States v. Brunel-Alvarez*, 991 F.2d 1452, 1456-58 (9th Cir. 1992).

The parties did not introduce evidence about just what a calendar deputy's functions or duties are, but at the hearing on this matter, Ceballos's lawyer acknowledged that a "disposition memo," which is what Ceballos prepared on March 2, 2000 is common. Indeed, Plaintiff admits that it was "pursuant to his duties as a prosecutor . . . [that] he wrote the memo expressing his concerns about the veracity of the officers in this case." (SGI ¶ 4). (In a commendable display of candor, Plaintiff's counsel reiterated that admission at the hearing on this motion.) As in *Gonzalez*, the memorandum was an "internal report [that was] simply a summary of his findings following his official investigations." 239 F.3d at 941-942.[5] It was not an

[5] At the hearing, the Court requested and obtained a copy of the memorandum. In it, Ceballos requested "permission to dismiss the information [i.e., the charges] against defendants Cuskey and Longoria . . . " Plaintiff obviously recognized that he needed Sundstedt's permission to

(Continued on following page)

abstract discourse on the responsibilities of prosecutors and law enforcement officers in light of the Rampart scandal.

The foregoing authorities and the precise context in which plaintiff uttered his speech established that, in fact, it was not constitutionally-protected.

C. Even If Plaintiff's Speech Was Protected Under The First Amendment, That Right Was Not "Clearly Established"

For a right to be "clearly established," "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier*, 121 S. Ct. at 2156. (citation deleted). Supreme Court and Ninth Circuit decisions make clear that the "clearly established" inquiry must be undertaken in a context-specific manner. *Id.*; *Brewster v. Board of Education of the Lynwood Unified School District*, 149 F. 3d 971, 978 (9th Cir. 1998). Thus, "[i]n assessing claims of qualified immunity, reviewing courts must not view constitutional rights in the abstract but rather 'in a more particularized, and hence more relevant, sense.'" *Brewster*, 149 F.3d at 978 (*quoting Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034 (1987)). "If officers of reasonable competence could disgree on the issue [whether a chosen course of action is constitutional], immunity should be recognized." *Brewster*, 149 F. 3d at 977 (*quoting Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092 (1986)).

do so, which reinforces the conclusion that the memorandum was prepared as part of his job.

The Court concluded above that the speech in question was not protected. Even if the Court is wrong, however, defendants are nevertheless entitled to summary judgment because given the authorities discussed above it was not "clearly established" that Plaintiff's March 2, 2000 memorandum addressed a matter of public concern. As a result, a reasonable official may have believed – even if incorrectly – that the speech was not protected by the First Amendment. This is sufficient to establish that the defendants are entitled to qualified immunity for their actions.[6]

II. BECAUSE SUMMARY JUDGMENT HAS BEEN GRANTED TO DEFENDANTS ON PLAINTIFF'S SOLE FEDERAL CAUSE OF ACTION, THIS COURT DECLINES TO EXERCISE JURISDICTION OVER PLAINTIFFS' STATE LAW CLAIM FOR IIED.

"The Supreme Court has stated, and we have often repeated, that 'in the unusual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.'" *Acri v. Varian Associates, Inc.*, 114 F. 3d 999, 1001 (9th Cir. 1997) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 fn. 7 (1988)). Because summary judgment has been granted to Defendants on Plaintiff's sole federal claim, this Court declines to exercise supplemental jurisdiction over Plaintiff's state

[6] Given this finding and conclusion, the Court need not reach the issue of whether it was "clearly established" that Plaintiff's interest in Freedom of speech outweighed the State's interest in administrative efficiency.

law claim for Intentional Infliction of Emotional Distress (IIED). As a result, that claim is hereby dismissed without prejudice.

CONCLUSION

For the foregoing reasons, and good cause appearing therefor, the Court GRANTS Defendants' Motion for Summary Judgment as to Plaintiff's Section 1983 claim. In addition, as there is no longer a basis for federal jurisdiction over Plaintiff's state law claim for IIED, that claim is hereby DISMISSED. A judgment reflecting this ruling will be lodged and shall be entered by the Clerk unless by February 8, 2002 any party files a written objection to its form.

IT IS SO ORDERED.

DATE: January 30, 2002 /s/ A. Howard Matz
A. Howard Matz
United States District Judge

APPENDIX C

NOTE CHANGES MADE BY THE COURT.

CINDY S. LEE, State Bar No. 168941
JIN S. CHOI, State Bar No. 180270
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, California 91101-3005
Telephone No. (626) 304-7830
Facsimile No. (626) 795-7460

Attorneys for Defendants
GIL GARCETTI, FRANK SUNSTEDT,
CAROL NAJERA and COUNTY OF LOS ANGELES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive, Defendants.	Case No. CV 00-11106 AHM (AJWx) ~~[PROPOSED]~~ **JUDGMENT** (Filed Feb. 7, 2002) THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

Judgment is entered in favor of Defendants GIL GARCETTI, FRANK SUNDSTEDT, and CAROL NAJERA

on Plaintiff's individual capacity claims under 42 U.S.C. § 1983, pursuant to this Court's January 30, 2002 ruling on Defendants' Motion for Summary Judgment.

Judgment is entered in favor of Defendants GIL GARCETTI and COUNTY OF LOS ANGELES on Plaintiff's official capacity and *Monell* claims under 42 U.S.C. § 1983, which had been alleged in the First Amended Complaint, pursuant to this Court's August 8, 2001 ruling on Defendants' Motion for Summary Adjudication re First Cause of Action.

Judgment is entered in favor of Defendants FRANK SUNDSTEDT and CAROL NAJERA on Plaintiff's official capacity claims under 42 U.S.C. § 1983, which had been alleged in the First Amended Complaint, pursuant to the September 19, 2001 entry of a Stipulation and Order to dismiss said claims with prejudice.

Plaintiff's other, state-based claim for intentional infliction of emotional distress, alleged against Defendants FRANK SUNSTEDT and CAROL NAJERA only, is dismissed for lack of jurisdiction[, without prejudice to re-filing in State court. /s/AHM]

IT IS SO ORDERED.

DATED: February ~~6~~ 7, 2002 /s/ A. Howard Matz
A. Howard Matz
United States District Court Judge

Respectfully submitted,

FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE

By /s/ Jin Choi
JIN S. CHOI
Attorneys for Defendants

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Fely Yamane, am employed in the aforesaid County, State of California; I am over the age of 18 years and not a party to the within action; my business address is 225 South Lake Avenue, Penthouse, Pasadena CA 91101-3005.

On February 6, 2002, I served the foregoing **[PROPOSED] JUDGMENT** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

Humberto Guizar, Esq.
Luis Carrillo, Esq.
Danilo J. Becerra
Moreno, Becerra, Guerrero & Casillas
3500 West Beverly Boulevard
Montebello, California 90640

BY MAIL: As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California, in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 6, 2002, at Pasadena, California.

/s/ Fely G. Yamane
Declarant

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD CEBALLOS, Plaintiff-Appellant v. GIL GARCETTI; et al., Defendants-Appellees.	No. 02-55418 D.C. No. CV-00-11106-AHM Central District of California, Los Angeles ORDER (Filed Jul. 06, 2004)

Before: REINHARDT, O'SCANNLAIN, and FISHER, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing en banc. Judge O'Scannlain has voted to grant the petition. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing on banc is **DENIED.**

MOTION FILED

NOV 8 - 2004

(2)

No. 04-473

In The
Supreme Court of the United States

GIL GARCETTI, *et al.*,

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

BURK E. DELVENTHAL
Counsel of Record
OFFICE OF THE CITY ATTORNEY
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
(415) 554-4650

JENNIFER HENNING
CALIFORNIA STATE ASSOCIATION OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
(916) 327-7535

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsels' Association of California. The County Counsels' Association is comprised of county counsels throughout California. The County Counsels' Association, though its Litigation Overview Committee, monitors litigation of concern to counties statewide.

CSAC submits this brief because of the negative impact of the Ninth Circuit's decision on the management of public entities throughout the state of California, including interference with the important role of public entities in performing the work of the electorate. Because of its membership, CSAC is in a position to provide a unique perspective to this Court to aid in the decision of the important issues raised by Petitioner.

This Court should grant certiorari to consider the impact of the expansion of First Amendment protection to the expression of individual public employees during the course of assigned work on behalf of government. A majority of Circuits, concerned with protecting speech of government employees, have failed to protect the mandate of a public entity to carry out the work of its constituency. The result constrains and even subordinates the public employer prerogative to the individual expression of opinion by a public employee. Moreover, the current conflict among the Circuits creates uncertainty and confusion and results in widely differing decisions. Because of the detrimental impact of the Ninth Circuit's

decision on the counties of California, CSAC respectfully requests leave to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

BURK E. DELVENTHAL
Counsel of Record
OFFICE OF THE CITY ATTORNEY
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
(415) 554-4650

JENNIFER HENNING
CALIFORNIA STATE ASSOCIATION
OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
(916) 327-7535

Attorneys for Amicus Curiae

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U.S. Const. amend. I ..... *passim*

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BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of the California State Association of Counties ("CSAC").[1] A motion for leave to file an amicus brief under Supreme Court rule 37.2(b) is included with this brief.

I. INTEREST OF *AMICUS CURIAE*

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsels' Association of California. The County Counsels' Association is comprised of county counsels throughout California. The County Counsels' Association, through its Litigation Overview Committee monitors litigation of concern to counties statewide.

CSAC has reviewed the Petition for Writ of Certiorari filed by Petitioners. CSAC finds the research and arguments in the Writ Petition clearly presented, well reasoned and legally sound; CSAC respectfully joins in these arguments.

The decision below and the split in the circuits regarding the appropriate application of the First Amendment in a public employment setting places an intolerable burden on public employers. First, public employers must conduct

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[1] Counsel for CSAC did not author this brief in whole. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

the business of the people, as directed by elected officials who must determine and pursue public policies. Employees must necessarily carry out that business. If an employee's routine employment responsibilities are imbued with First Amendment protection, then the public employer is put in the untenable position of having to weigh the work of the people, as guided by elected officials, against the expressed opinion of an employee – whether meritorious or not – whenever it considers an employment action related to the employee. Second, the inherent difficulty in distinguishing between protected and unprotected public employee speech subjects public employers to intolerable legal uncertainty. CSAC submits this brief to address the impact of the Ninth Circuit decision on public agencies in general and county government in particular, and to argue that certiorari review is needed to correct the Ninth Circuit's erroneous interpretation of the First Amendment and to resolve the growing inter-Circuit conflict.

II. SUMMARY OF ARGUMENT

Of necessity, the work of government must be performed through employees. To function at all, let alone efficiently and effectively, government must have the ability to regulate the on-duty speech of public employees. This Court has long recognized that a private citizen's right to free speech may be restricted once the citizen becomes a government employee. A public entity "is the spokesman for the Government. A [statement] made by [a public employee] must be attributed, for these purposes, to the Government." *Giglio v. United States,* 405 U.S. 150, 154 (1972).

The Ninth Circuit's decision, however, greatly undermines the ability of public agencies to perform the public's business by conferring First Amendment protection upon a public employee's personal expression that occurs in the context of that employee's work on behalf of government. The rule created by the Ninth Circuit expands the definition of speech of "public concern." This expanded definition encompasses volumes of speech made during the course of routine public employee duties. As a result, the public employer's capacity to supervise and marshal employee resources in the efficient management of the public's business is greatly crippled. The looming, yet uncertain, threat of federal judicial scrutiny may well chill the exercise of what would otherwise be rational, effective management practices.

The Ninth Circuit's application of First Amendment protection to the routine work of public employees has not been unanimously adopted by other Circuits. The inter-Circuit conflict creates a growing confusion and uncertainty over the proper standard. The growing misapplication of First Amendment protection to speech made *on behalf of the government* requires intervention by this Court.

III. ARGUMENT

THE NINTH CIRCUIT'S DECISION EXPANDING FIRST AMENDMENT PROTECTION FOR PUBLIC EMPLOYEE SPEECH MADE PURSUANT TO ROUTINE JOB REQUIREMENTS CREATES AN OVERWHELMING BURDEN ON PUBLIC EMPLOYERS AND FEDERAL COURTS.

Over thirty-five years ago, this Court first established the doctrine that speech by a government employee can,

under certain circumstances, be protected by the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Connick v. Myers*, 461 U.S. 138 (1983), however, the Court clarified that a federal court is not the proper forum to review personnel decisions where a public employee's speech is made "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest."

These decisions set the parameters for First Amendment protection for public employees. The decision below goes far beyond these parameters and articulates the untenable doctrine that "[i]t is only when it is clear that . . . the information would be of *no* relevance to the public's evaluation of the performance of government agencies that speech of government employees receives no protection under the First Amendment." *Ceballos v. Garcetti*, 361 F.3d 1168, 1174 (9th Cir. 2004) (Emphasis in original; internal quotations and citations omitted). On some level, all work of public employees provides a basis for the public's evaluation of the performance of government agencies. Must public entities ascribe actual or potential constitutional significance to public employee expression made in the context of routine, required work? The decision below answers that question affirmatively. But this standard affords protection to employee speech that has been recognized as subject to regulation by the government. Moreover, speech contained in a memorandum authored by a government employee being paid by the government to perform duties required by the government, such as the speech at issue in this case, is accurately characterized as the work of the government belonging to the government.

Indeed, the Ninth Circuit and a majority of other Circuits have stretched the application of *Connick's* term "public concern" so thin as to become meaningless. The interpretation of the *Connick/Pickering* balancing test by the majority of the circuits, if permitted to stand, will expose to federal judicial review an unlimited array of public employer personnel decisions which can be linked in any manner to an oral or written statement made by a public employee while performing his or her duties.[2] Under this balancing test, the public interest in promoting efficient conduct and management of the business of the people by public entities does not figure into the equation. That interest is relegated to a position subordinate to a perceived paramount interest in protecting individual speech by an individual public employee in the course of performing his or her job duties.

1. The Ninth Circuit's Analysis Ignores The Critical Distinction Between Government As Sovereign And Government As Employer.

This Court has consistently recognized that a private citizen's right to free speech is distinguishable from that of a government employee's right to free speech, especially when the speech is the work product of the employee acting in the course and scope of his or her duties as a government employee. It is axiomatic that a public employer may, at times, restrict the speech of its employees, for "our 'profound national commitment' to the freedom of speech must of necessity operate differently when the

[2] Invoking federal jurisdiction under this theory will not be a difficult task given that unsatisfactory performance on the job is at the root of most adverse employment decisions.

government acts as employer rather than sovereign." *Waters v. Churchill*, 511 U.S. 661, 679 (1994).

For example, while government cannot infringe upon a private citizen's manner of speech, public agencies can prevent employees while acting in the course and scope of their duties from using offensive speech to members of the public or co-workers. As employer, a public entity also may expect that its employees will not counsel other employees to violate the policies of the public entity in the discharge of their duties. Indeed, government may even prohibit an employee's off duty participation in political campaigns. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

It is well established, therefore, that just as the First Amendment affords government as an employer more latitude in regulating the speech of its employees than it may exercise in its role as sovereign over the speech of private citizens. These principles arise from the fact that government of necessity must act through its employees and from the public's interest in government that is effective and efficient in achieving its goals. By design and by law, government is required to perform particular functions. To that end, public entities must hire employees to carry out the public mandate in exchange for compensation and the satisfaction of working as a public servant. Inherent in this arrangement is the necessity that the employee is the instrument of the public entity and must carry out his or her job duties in accordance with governmental policies as articulated and directed by the employee's supervisor, or other policy makers.

Particularly employees who serve as subordinate deputies of an elected official can be expected to carry out

the policies of the official, as directed by that official. That official in turn answers to and carries out the will of her constituency. Principles of loyalty are essential to the discharge of a public employee's duties. Yet the Ninth Circuit would shield with the First Amendment an employee who rejects the elected official's policies or the implementation of those policies and speaks out – in connection with his or her job duties – against the will of that elected official.

Further, by extending First Amendment protection to all speech required by a public employee's job, the Ninth Circuit's decision essentially eliminates the "citizen" distinction recognized by *Connick* and ignores the employer's right to restrain speech made *on behalf of the government*. This expansion, coupled with the inconsistency and lack of direction among the Circuits regarding what is and what is not protected speech, creates a state of confusion and trepidation for public employers, and a climate for inaction to deal with employee misconduct or incompetence. Further, this interpretation turns on its head the notion that government does the work of the people. Elected officials and those acting at the direction of the elected officials must set the people's agenda. That agenda should not be preempted by an individual employee's personal agenda – no matter how noble that agenda may be.

2. The Ninth Circuit's Holding Substantially Interferes With The Rights Of Government To Regulate Speech Made On Its Behalf.

When a public employee speaks in the course and scope of his or her duties, he or she speaks for the

government.[3] The amount of speech of "public concern" generated by any random public employee during his or her public service career is virtually immeasurable. Some public servants in the course of their duties make public pronouncements almost daily. Examples include prosecutors, health and medical personnel, law enforcement officials, county counsel, tax assessors, and social service providers, to name but a few. It is alarming to contemplate that any instance of this speech could later form the jurisdictional basis for an action in federal court.

The holding below clothes such speech in First Amendment protection. This far-reaching result places additional restrictions on the public employer's management of its workforce. Yet public employers already face more regulation of the human resource function than the private sector. For example, public employers must observe employee due process rights and liberty interests. Civil service protections exist for many government employees. In some cases public employees are unionized and have protections built in through the collective bargaining process. The decision below recognizes a further employee right to express protected opinions about wrongdoing or corruption within the course and scope of his or her employment. As a practical matter this employee right, which must be considered and evaluated in connection with every personnel decision, will lead to virtual paralysis of the government processes in place to discipline or discharge unsatisfactory employees. Moreover, in

[3] As this Court has explained, a public entity "is the spokesman for the Government. A [statement] made by [a public employee] must be attributed, for these purposes, to the Government." *Giglio v. United States*, 405 U.S. 150, 154 (1972).

order to avoid liability in litigation, the public employer is likely to err on the side of foregoing corrective action in the case of an employee who has expressed criticism of government while carrying out job duties. As a result, the government will retain workers who have been identified by the government as ineffective or unsatisfactory.

We hasten to point out that overruling the decision below will not mean that corruption or official wrongdoing will or must go unpunished. In fact, there are federal and state laws that provide protection for "whistleblowing." The United States and California Constitutions generally protect public employees' right to off-duty speech about their public employer. In that context the burden to justify discipline shifts to the employer. That is, before the public employer can discipline an employee for off-duty speech the employer must demonstrate either (1) that the employee was not authorized to speak on behalf of the entity but held himself out as an authorized spokesperson speaking on behalf of the entity or (2) that the employee is a high ranking confidential adviser to the appointing officer and that confidence and trust of the appointing officer in the subordinate are essential qualifications of the job and that the specific off-duty speech undermined that trust. This standard gives wide latitude to most pubic employees who wish to speak out on their own time on matters of public interest.

A government employer should be free to make employment decisions related to speech made within the context of the public employee's job without having to exalt the employee's opinions over the government's imperative to do the work of the public. The burgeoning expansion of First Amendment rights for public employees cries out for intervention by this Court.

3. Review By This Court Is Necessary To Resolve Lack Of Uniformity Caused By Inter-Circuit Conflict On The Issue Of Public Employment Speech.

As set forth in Petitioner's Petition for Writ of Certiorari, conflict exists among the Circuits with respect to First Amendment protection in the public employment setting.

As a result, differing standards of constitutional protection for individuals and entities depend on the location of the public entity. While governmental entities are unable to change locations to gain the benefit of a more "employer-friendly" jurisdiction, fundamental fairness and principles of federalism dictate that public entities based in different states should not suffer differing burdens imposed by federal law.

IV. CONCLUSION

As argued by Petitioner, and supported by the foregoing additional reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BURK E. DELVENTHAL
Counsel of Record
OFFICE OF THE CITY ATTORNEY
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
(415) 554-4650

JENNIFER HENNING
CALIFORNIA STATE ASSOCIATION OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
(916) 327-7535

Attorneys for Amicus Curiae

(3)

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IN THE

Supreme Court of the United States

GIL GARCETTI, *et al.*,

Petitioners,

v.

RICHARD CEBALLOS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BONNIE I. ROBIN-VERGEER
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

HUMBERTO GUIZAR
Law Offices of Humberto Guizar
3500 West Beverly Boulevard
Montebello, CA 90640
(323) 725-0917

Counsel for Respondent

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QUESTION PRESENTED

Does a prosecutor speak on a matter of public concern under *Connick v. Myers*, 461 U.S. 138 (1983), when, through a series of communications made both within and outside the District Attorney's office where he is employed, he brings to light and expresses concern that a deputy sheriff may have falsified an affidavit to procure a search warrant in a case under the prosecutor's supervision?

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STATUTE

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Richard Ceballos, a Deputy District Attorney in the Los Angeles County District Attorney's Office, reported to his immediate supervisor, his supervisor's superior, his colleagues in the District Attorney's Office, and the Sheriff's Department his determination that a Deputy Sheriff had falsified an affidavit used to obtain a search warrant in a criminal matter under Ceballos's supervision. Ceballos subsequently shared his determination with the defense counsel in the underlying case in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963), and testified pursuant to a defense subpoena at a hearing challenging the basis of the search warrant. In response, his supervisors retaliated against him.

The U.S. Court of Appeals for the Ninth Circuit ruled that the individual defendants were not entitled to summary judgment on qualified immunity grounds because, viewing the facts in the light most favorable to Ceballos, his speech was protected by the First Amendment, his constitutional right was clearly established, and the officials' acts were not objectively reasonable. The panel accordingly remanded the case for further proceedings. Petitioners seek review of only one aspect of that ruling—the court of appeals' determination that Ceballos's speech addressed a matter of public concern.

Petitioners repeatedly assert that the alleged retaliation occurred in response to Ceballos's preparation of a single "routine" disposition memorandum shared with only two supervisors. They argue that because Ceballos's speech bringing to light the alleged misconduct and breach of public trust by the Sheriff's Department was related to his job and communicated in the course of his job duties, his speech was not a matter of "public concern" under *Connick v. Myers*, 461 U.S. 138 (1983). They claim that because it was expressed as part of his job, Ceballos's speech "by definition, cannot be characterized as 'citizen speech,'" and therefore deserves no First Amendment protection. Pet. 13.

As discussed below, petitioners are wrong on the facts and wrong on the law. Ceballos did not communicate his views

about the Deputy Sheriff's allegedly false affidavit solely through a single memorandum to two supervisors; he expressed his concerns to his colleagues in the District Attorney's office, to his supervisors (both orally and in writing), to the Deputy Sheriff who authored the affidavit, in a meeting with his supervisors and several representatives of the Sheriff's Department, to the defense counsel in the underlying case, in a court hearing, and later, while retaliation was already underway, in a meeting with the Mexican American Bar Association. Far from being "routine," Ceballos's repeated expressions of concern that the Sheriff's Department had misrepresented the facts—if not committed perjury—in conducting a criminal investigation were quite extraordinary. In challenging the lawfulness of the conduct of the Sheriff's Department, Ceballos's statements were speech that indisputably addressed a matter in which the public's interest is at its peak. The community's interest in such reports of misconduct was all the more acute in Los Angeles, where the police department had been racked by the "Rampart" scandal exposing police misconduct only six months before Ceballos wrote his March 2000 memoranda.

Even if the facts were as petitioners claim, there would be no basis for further review. Not only did the Ninth Circuit faithfully apply this Court's precedents, but, contrary to petitioners' assertion, its decision is consistent with that of every other court of appeals deciding an analogous case. No circuit has adopted the per se approach urged by petitioners, and none would have held that Ceballos's speech failed to meet *Connick*'s threshold. Thus, this case would serve as a poor vehicle for probing any differences in treatment of the *Connick* public concern gatekeeping test.

Finally, petitioners and their amicus maintain that unless this Court establishes their per se rule, the First Amendment protection of job-related public employee speech on matters of public concern "will have a crippling effect" on the management of public agencies. The circuits already recognize

that such speech is protected by the First Amendment, and no management crisis has materialized. Equally important, petitioners fail to consider the adverse consequences for free expression and self-governance that would accompany a per se rule, which would effectively strip public employees of their right—indeed, duty—to bring to light official misconduct unless they run every time to the media rather than discreetly pursue internal channels of communication. The perverse incentives of the rule petitioners urge are so obvious that there is no need for further review by this Court.

STATEMENT

The facts, viewed in the light most favorable to the respondent, are as follows. Richard Ceballos has served as a Deputy District Attorney in Los Angeles since 1989. In 1997 or 1998, he was assigned to the Pomona Branch of the District Attorney's Office and about a year later was promoted to calendar deputy, a prestigious position affording him supervisory responsibilities over more junior Deputy District Attorneys. Pet. App. 2-3; Excerpts of Record ("ER") 177-78. In early 2000, a lawyer representing one of the defendants in *People v. Cuskey*, a case then being prosecuted by the District Attorney's Office under Ceballos's supervision, approached Ceballos and asked him to investigate whether one of the arresting Deputy Sheriffs lied in an affidavit he swore out to obtain a search warrant. Pet. App. 3; ER 180-82. Ceballos agreed to look into it. After reviewing the evidence, visiting the crime scene, and discussing the matter with colleagues in his office, and after a meeting with his direct supervisor, Carol Najera, and her superior, Head Deputy District Attorney Frank Sunstedt, Ceballos determined that the affidavit was indeed false and misleading. Ceballos's colleagues and supervisors agreed that the validity of the warrant was questionable. Pet. App. 3; ER 182-89.

On March 2, 2000, Ceballos provided Sunstedt a memorandum, or disposition report, discussing his assessment

that the Deputy Sheriff had relied on inaccurate and misleading information provided by other officers and falsified his affidavit; Ceballos recommended that the case be dismissed. Pet. App. 3; ER 365-66. The memorandum minced no words and accused the Deputy Sheriff of having committed perjury. ER 546-49. It is undisputed that Ceballos charged misconduct on the part of the affiant and other law enforcement officers to bring their wrongdoing to light and not to further some private interest or grievance. *See* Pet. App. 19. Sunstedt treated the memorandum as exceptional, as if Ceballos's accusations raised a "novel issue." ER 210. He directed Ceballos to revise the memorandum and make it less accusatory of the Deputy Sheriff, particularly because the memorandum was to be shared with the Sheriff's Department. Pet. App. 3; ER 60, 190, 546-49. Ceballos complied and revised the memorandum, but it continued to reflect his conclusions that the Deputy Sheriff's characterizations of the crime scene in his affidavit were "grossly inaccurate," "clearly misleading," omitted key facts, and quite possibly, were wholly fabricated. ER 742-44.

On March 6, 2000, Ceballos wrote another memorandum to Sunstedt reporting a conversation Ceballos had had with the Deputy Sheriff, in which Ceballos told the Deputy that statements in his affidavit appeared to be "grossly inaccurate." ER 745. The March 2 memorandum, if not both memoranda, were faxed to the Sheriff's Department, ER 179-80, 755, and a meeting was held on March 9, 2000, attended by several representatives from the Sheriff's Department, Sunstedt, Najera, Ceballos, and the Deputy District Attorney originally assigned to the *Cuskey* case. Pet. App. 3; ER 179. Everyone at the meeting had a copy of the March 2 memorandum. R. 43, Ceballos Depo. Tr. 97. During that meeting, representatives from the Sheriff's Department verbally attacked Ceballos, accused him of acting like a "public defender," and demanded that he be removed from the case. *Id.* at 97-99. The captain in the Sheriff's Department also wanted the case to go forward because he was fearful that one of the defendants would file a

lawsuit against the Department. ER 194.

Following the meeting with the Sheriff's Department, Sunstedt decided to proceed with the case pending the outcome of a defense motion challenging the basis for the search warrant. Pet. App. 3-4; ER 64, 552-54. Ceballos informed defense counsel that he believed the affidavit contained false statements, and the defense subpoenaed him to testify at the hearing on their motion. Pet. App. 4. Ceballos told Carol Najera, his supervisor, that pursuant to *Brady v. Maryland*, he was required to turn over to the defense the two memoranda he had written expressing his opinion regarding the illegality of the search warrant. *Id.* According to Ceballos, Najera instructed him to write a new memorandum that contained only the statements of the Deputy Sheriff who had prepared the affidavit and to omit all other information; Najera also made a veiled threat of retaliation if Ceballos testified candidly at the defense hearing. ER 195-97, 738-39, 757; R. 43, Ceballos Depo. Tr. 120-22. Ceballos refused to write a new memorandum, but agreed to provide copies of his memoranda to the defense with work product redacted. ER 195, 738; R. 43, Ceballos Depo. Tr. 120-22, Najera Depo. Tr. 126-28. Ceballos later testified at the hearing on defendants' motion challenging the search warrant, but as a result of objections by the prosecution, Ceballos's testimony was restricted. The defense motion was denied. Pet. App. 4.

Soon after, the District Attorney's Office took several retaliatory actions against Ceballos, including demoting and transferring him to an inconvenient branch of the office, reassigning one of his murder cases to a junior colleague with no murder trial experience, refusing to assign him additional murder cases, and denying him a promotion. Pet. App. 4-5; ER 171-78, 199-208, 378-79, 736, 740. Ceballos filed a grievance challenging these various actions. ER 735-52. While his grievance was pending, he spoke out at the Mexican-American Bar Association ("MABA") about the Sheriff Department's alleged wrongdoing in the *Cuskey* case, the District Attorney's

lack of a policy for dealing with cases in which prosecutors suspect police misconduct, and the retaliation against him. The president of MABA called then-District Attorney Gil Garcetti to discuss MABA's concerns about Ceballos's allegations. R. 43, Ceballos Depo. Tr. 178, Declaration of James E. Blancarte. Only a few days later, the District Attorney's Office denied Ceballos's grievance. Ceballos claims that his grievance was denied at least in part because he spoke to MABA. *Id.*, Ceballos Tr. 177-78; ER 302-03 ¶ 22. Subsequently, Ceballos filed a § 1983 action against his supervisors, the District Attorney, and Los Angeles County challenging the retaliation on First Amendment and other grounds.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS, AND THERE IS NO CIRCUIT SPLIT.

A. This Court's Precedents

Petitioners attempt to manufacture a false dichotomy between "citizen speech" on matters of public concern, which would meet the *Connick* threshold, and "employee speech" on matters of public concern, which would not. The Court drew no such distinction in *Connick* or any other case. In *Connick*, the Court explained that

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters *only of personal interest*, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 147 (emphasis added). It is only "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community," that

government officials "enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146; *see also City of San Diego v. Roe*, 125 S. Ct. 521, 525-26 (2004) ("[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."). The Court in *Connick* did *not* suggest that the availability of First Amendment protection for speech on matters of critical public concern (such as abuse of authority by local law enforcement) turns on a characterization of whether the employee spoke "as a citizen," "as an employee," or both. To the contrary, the Court emphasized that if the plaintiff in *Connick* had sought "to bring to light actual or potential wrongdoing or breach of public trust" by the District Attorney instead of "gather[ing] ammunition for another round of controversy with her superiors," then more of her information gathering would have addressed a matter of public concern, even though her expression plainly would still have been job-related. *Connick*, 461 U.S. at 148.

Since at least its decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court has recognized that the right of a public employee to speak out on matters of public concern is so integral to the employee's role as a citizen and the community's interest in self-governance that the government must make a substantial showing of disruption before it may punish such speech. "[A] government employee, *like any citizen*, may have a strong, legitimate interest in speaking out on public matters." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) (emphasis added). Accordingly, the Court has ruled "that statements by public officials on matters of public concern must be accorded First Amendment protection" unless outweighed by the state's interest as an employer in promoting efficiency or avoiding disruption. *Pickering*, 391 U.S. at 574; *see also Connick*, 461 U.S. at 154 ("[T]he First Amendment's primary aim is the full

protection of speech upon issues of public concern . . . ."); *accord Board of County Comm'rs v. Umbehr,* 518 U.S. 668, 675 (1996); *Rankin v. McPherson,* 483 U.S. 378, 384 (1987).

Petitioners argue that in both this case and its earlier decision in *Roth v. Veteran's Administration,* 856 F.2d 1401 (9th Cir. 1988), the Ninth Circuit gave short shrift to what they claim is an independent "citizen speech" component of the *Connick* threshold that a public employee must satisfy before he can compel his employer to justify a retaliatory employment action. Pet. 11-13. Petitioners do not define "citizen speech" and do not articulate what they believe is missing that would convert Ceballos's reports of law enforcement misconduct from (unprotected) employee speech to (protected) citizen speech. Petitioners have found it easier to say what they believe "citizen speech" is *not*—either speech that is related to a public employee's job or speech that is made in the course of performing the employee's job duties. Pet. 11, 13.[1]

But if Ceballos's speech addressed a topic of public concern, which evidently petitioners do not dispute, Pet. i, 4, then the fact that the speech was job-related does not, under this Court's cases, divest that speech of First Amendment protection. Not only has this Court extended constitutional protection to speech addressing topics of public concern when the speech was both related to the public employee's job and communicated in the workplace, *see, e.g., Givhan v. Western Line Consolidated School Dist.,* 439 U.S. 410, 413-16 (1979) (teacher's communications solely to school principal challenging school policies and practices believed to be racially discriminatory were protected speech); *accord Connick,* 461

[1] It is unclear whether petitioners are taking the position that *all* "purely job-related speech" by public employees—whether or not on topics of public concern—fails to meet the *Connick* threshold, *see, e.g.,* Pet. i, 9 n.3, 11, 18, or whether their view is that only public employees' speech (especially "routine" speech) performed in the course of their duties is unprotected. *See, e.g., id.* at 4, 11 & n.4, 13.

U.S. at 148 n.8 (teacher in *Givhan* spoke out "as a citizen" on "a matter inherently of public concern"), but the Court has assumed that protected employee speech on matters of public concern would *generally* be job-related.

As the Court observed in *United States v. National Treasury Employees Union,* 513 U.S. 454 (1995) ("*NTEU*"), its decision in *Rankin v. McPherson, supra,* in which a public employee made a remark about hoping "they get him" the next time an attempt was made on President Reagan's life, was, at the time of *NTEU*, "the only case" in which the Court had applied the *Pickering* balance "to speech whose content had nothing to do with the workplace." *Id.* at 466 n.10. And, as it reiterated only last month, the Court "has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment." *Roe,* 125 S. Ct. at 523. Although the Court in *Roe* distinguished the category of protected *job-related* speech from expression by government employees on topics "unrelated to their employment," the Court still recognized that *both* categories are protected absent a strong governmental justification. *Id.* at 523-24.[2]

Furthermore, if petitioners were right, and a nexus between a public employee's speech and his employment duties were sufficient to deny the speech First Amendment protection at the gate, the entire nature of the *Pickering* balancing would be upset. For example, in *Rankin,* the Court instructed that "the

[2] In *NTEU,* 513 U.S. at 465, the Court discussed the lack of "relevance to their employment" of most employee speech barred by the honoraria ban in the course of explaining why the government's interest in the ban was so weak, as the barred speech had no "adverse impact on the efficiency of the offices in which they work." The Court never suggested that if the banned speech had been job-related, no *Pickering* balance would have been necessary because the speech per se would not have met *Connick*'s public concern threshold.

manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." 483 U.S. at 388; *accord Connick*, 461 U.S. at 152-53. In balancing the employee's and employer's competing interests, a court is to consider "the responsibilities of the employee within the agency," *Rankin*, 483 U.S. at 390, and whether the speech "impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* at 388. That the impact of the speech on the employee's job duties is evaluated under the *Pickering* balance *presupposes* that such speech will often be related to those duties. *See, e.g., Lee v. Nicholl*, 197 F.3d 1291, 1296 n.1 (10th Cir. 1999) ("overly emphasizing the forum of speech used by the employee threatens to upset the *Pickering* balance").[3]

The Ninth Circuit's approach here is fully consistent with this Court's precedents. Petitioners' insistence that the court of appeals focuses on the content of public employees' speech to the exclusion of other considerations is a distortion. *See* Pet. 12-13. Neither Ceballos nor the Ninth Circuit denies that, as this Court has said, *see Connick*, 461 U.S. at 147-48, in

[3] Petitioners' contention that public employees have no personal interest in the content of their job-related speech because their speech is actually the government's, *see* Pet. 11 n.4, 14 n.5; *see also* Pet. App. 41-46 (O'Scannlain, J., specially concurring), and the amicus's related argument that the court of appeals' approach interferes with the government's ability to regulate speech made on its own behalf, *see* Amicus Br. 7-9, are inexplicable. Ceballos's March 2000 memoranda expressed his own personal views regarding the conduct of the Sheriff's Department and made his own personal recommendation, for Sunstedt to take or leave, regarding the proper disposition of the criminal case at issue. *See Bonds v. Milwaukee County*, 207 F.3d 969, 980-81 (7th Cir. 2000). Case law on the government's right to control speech *made on its own behalf*, such as at a press conference or in a legal brief, has no bearing on whether an *employee himself* speaks on a matter of public concern when he reports official misconduct to his supervisor.

addition to its content, the form and context of public employee speech are relevant in gauging whether the punished expression actually involved a matter of public concern. *See* Pet. App. 8. In *Roth v. Veteran's Administration*, a case on which the court of appeals relied here, *see id.* at 10-12, the Ninth Circuit explicitly denied that all speech on such topics of public interest as misuse of public funds, wastefulness, and government inefficiency "*automatically* deserves protection." 856 F.2d 1401, 1405 (9th Cir. 1988) (emphasis added). Instead, *Roth* stressed that it was important to examine "the context" of the speech, particularly "the point" of the speech, to judge whether it "'seek[s] to bring to light actual or potential wrongdoing or breach of public trust,' which warrants protection," or is "speech that merely reflects one employee's dissatisfaction with her employment." *Id.* (quoting *Connick*, 461 U.S. at 148). Not only does this analysis closely track this Court's direction in *Connick*, but it mirrors the basic approach of the other circuits, to which we now turn.

B. Circuit Cases

There is an overwhelming consensus in the courts of appeals that whether law enforcement agencies are properly and lawfully performing their responsibilities is a core matter of public concern. As the Fifth Circuit put it: "Exposure of official misconduct, especially within the police department, is generally of great consequence to the public." *Branton v. City of Dallas*, 272 F.3d 730, 740 (5th Cir. 2001); *see also Guilloty Perez v. Pierluisi*, 339 F.3d 43, 52 (1st Cir. 2003); *Delgado v. Jones*, 282 F.3d 511, 517 (7th Cir. 2002); *Baldassare v. New Jersey*, 250 F.3d 188, 196-97 (3d Cir. 2001); *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1292 (11th Cir. 2000). Ceballos's speech seeking to expose the Sheriff Department's alleged falsification of an affidavit to procure a search warrant falls squarely within this line of cases.

Petitioners assert, however, that the "current legal landscape" is rife with "conflict and confusion," Pet. 17, that

the Ninth Circuit's approach to public employee speech is contrary to the analysis adopted by a number of other circuits, *id.* at 14-17, and that the opinions even *within* several of these circuits are not internally consistent. *Id.* at 17. What petitioners cite as irreconcilable opinions within the circuits, however, are simply decisions that distinguish cases based on factual differences. As the Ninth Circuit noted, although other circuits have held in some instances that public employees' speech pursuant to job-related duties did not involve matters of public concern, "it was ordinarily because the speech at issue primarily involved either personal grievances or the 'routine discharge of assigned functions, where there is no suggestion of public motivation,'" Pet. App. 16 n.7 (citation omitted)—neither of which is applicable here. No court of appeals has adopted the per se approach petitioners urge, and none of the cases in these other circuits is at odds with the Ninth Circuit's decision.

In *Gonzalez v. City of Chicago,* 239 F.3d 939 (7th Cir. 2001), on which petitioners heavily rely, the Seventh Circuit held that a police officer's official reports discussing police misconduct, pursuant to his duties to investigate alleged misconduct, did not address matters of public concern because they addressed primarily "internal office affairs" and contained "simply a summary of his findings following his official investigations." *Id.* at 941-42. The Seventh Circuit has gone to great pains to explain why *Gonzalez* is not controlling in other situations much closer to Ceballos's case. In *Delgado v. Jones,* 282 F.3d 511 (7th Cir. 2002), for example, the court found that a police detective's memorandum to his superior about criminal activities involving a close relative of an elected official, who, in turn, was a close personal friend of the police chief, addressed a matter of public concern. Focusing on the "point of the speech," the Seventh Circuit reasoned that a communication by a law enforcement officer containing information essential to an investigation of serious criminal activity involved a matter of public concern and that the

communications would not have benefited the plaintiff personally. *Id.* at 517-18. The court rejected the defendant's proposed per se approach, which relied on *Gonzalez,* that communications that are part of an employee's regular job duties are not matters of public concern, and limited *Gonzalez* "to routine discharge of assigned functions, where there is no suggestion of public motivation." *Id.* at 519; *see also Delgado v. Jones,* 95 Fed. Appx. 185 (7th Cir.) (reaffirming earlier ruling), *cert. denied.,* 125 S. Ct. 346 (2004); *Cygan v. Wisconsin Dep't of Corrections,* 388 F.3d 1092, 1100-01 (7th Cir. 2004); *Bonds,* 207 F.3d at 980 ("[W]e commonly have found speech by public employees spoken pursuant to their employment duties to constitute speech on a public concern."); *Hulbert v. Wilhelm,* 120 F.3d 648, 653-54 (7th Cir. 1997).

Here, as in *Delgado,* there was nothing "rote" or "routine" about Ceballos's March 2000 memoranda and surrounding communications. More to the point, there is nothing in the Seventh Circuit's rulings that remotely endorses the notion that the First Amendment excludes speech made in the course of a public employee's job duties.

So, too, in *Thomson v. Scheid,* 977 F.2d 1017 (6th Cir. 1992), cited by petitioners, the Sixth Circuit held that the plaintiff's conversations, during an investigation of possible fraud, regarding the way the investigation was being conducted and departmental procedures, concerned "matters of internal department policy," rather than matters of public concern. *Id.* at 1021. But in subsequent cases, the Sixth Circuit has repeatedly rejected public employers' arguments, relying on *Thomson,* that an employee who speaks out on a matter of public concern during the course of performing employment duties is not entitled to First Amendment protection. *See, e.g., Rodgers v. Banks,* 344 F.3d 587, 597-99 (6th Cir. 2003); *Taylor v. Keith,* 338 F.3d 639, 644-46 (6th Cir. 2003); *Williams v. Kentucky,* 24 F.3d 1526, 1535 (6th Cir. 1994). For instance, in *Taylor,* the court held, focusing on "the point of the speech in question," 338 F.3d at 645 (emphasis omitted), that a police

officer's submission of a *required* report in which he charged another officer with excessive use of force addressed a matter of public concern because his speech was intended to communicate the potential wrongdoing of a fellow officer. *See id.* at 645-46.

Likewise, in *Koch v. City of Hutchinson,* 847 F.2d 1436 (10th Cir. 1988) (en banc), also cited by petitioners, the Tenth Circuit, relying on the content, form, and context of the speech at issue, ruled that a fire marshal's official report regarding the cause of a fatal fire did not address a matter of public concern because it was "simply one of many routine official reports," *id.* at 1447, and because there was no evidence that the plaintiff's report "was in any way motivated or inspired by . . . improprieties or by the desire to expose those improprieties." *Id.* at 1448. In that very case, however, the Tenth Circuit *rejected* the city's argument that communications made in the course of an employee's official duties are per se exempt from First Amendment protection. *Id.* at 1442. Accordingly, in subsequent decisions analogous to the Ninth Circuit's here, the Tenth Circuit has held that public employee speech made in the course of employment involved matters of public concern. In *Dill v. City of Edmond,* 155 F.3d 1193 (10th Cir. 1998), for example, a police officer wrote a letter to the then-chief of police stating that he was aware of exculpatory evidence in a murder case that he wanted to bring to the attention of the district attorney. The court held that because the officer's speech concerned possible wrongdoing by his fellow police officers, his statements addressed a matter of public concern. *Id.* at 1202. Distinguishing *Koch,* the Tenth Circuit emphasized that the officer's expression involved more than a routine summary report and was conveyed "to bring to light the possible mishandling of a murder investigation." *Id.*; *see also Lee,* 197 F.3d at 1295.

This same pattern has played out in the other circuits as well. In decisions cited by petitioners, the courts have made fact-specific judgments that particular public employee speech

did not address matters of public concern, either because the speech reflected a routine discharge of a job function and was not intended to bring wrongdoing to light, or because the expression focused on personal grievances or internal office policy. These same circuits have decided many other cases, however, with facts more apposite to those here, in favor of First Amendment protection—often explicitly distinguishing the decisions on which petitioners rely. No circuit has adopted the per se exemption from First Amendment protection for job-related employee speech urged by petitioners. In addition to the decisions discussed above, see the following case law from other circuits from which petitioners have cited decisions:

- **Fourth Circuit:** *Compare Urofsky v. Gilmore,* 216 F.3d 401, 406-09 (4th Cir. 2000) (en banc) (holding that state statute prohibiting state employees from accessing sexually explicit material on state computers did not implicate matters of public concern, with no public employee speech exposing government misconduct involved), *with Mansoor v. Trank,* 319 F.3d 133, 138 (4th Cir. 2003) (recognizing that "in fact, matters 'relating to your employment' clearly *can* encompass matters of public concern") (emphasis in original), *Robinson v. Balog,* 160 F.3d 183, 187-89 (4th Cir. 1998) (public employees who testified at public hearing and cooperated with federal investigators engaged in protected speech on matter of public concern, even though speech was obviously job-related), *and Mansoor v. County of Albermarle,* 124 F. Supp. 2d 367, 375-76 (W.D. Va. 2000) (*Urofsky* does not hold that a public employee may not speak as a citizen upon matters of public concern that also relate to his official duties).

- **5th Circuit**: *Compare Gillum v. City of Kerrville,* 3 F.3d 117, 121 (5th Cir. 1993) (police officer contesting his role in an internal investigation spoke as an employee embroiled in a personal employment dispute, not on a matter of public concern), *and Terrell v. University of Texas Sys. Police,* 792 F.2d 1360, 1363 (5th Cir. 1986) (police officer's notes

regarding police chief's performance, which plaintiff made no effort to communicate to the public, were "tied to a personal employment dispute"), *with Kennedy v. Tangipahoa Parish Library Bd. of Control,* 224 F.3d 359, 367-75 (5th Cir. 2000) (letter from library supervisor to director regarding need for greater library security measures addressed matter of public concern, even though letter was written in employee's official capacity, distinguishing *Gillum* and *Terrell*), *Branton,* 272 F.3d at 739-41 (internal affairs investigative officer spoke on a matter of public concern when, pursuant to her job responsibilities, she reported false testimony to a hearing officer in a police disciplinary case she investigated), *Thompson v. City of Starkville,* 901 F.2d 456, 464- 67 (5th Cir. 1990) (police officer's written complaints about improper promotions and other misconduct addressed matter of public concern because he brought misbehavior to light, distinguishing *Terrell*), *and Wilson v. UT Health Center,* 973 F.2d 1263, 1269-70 (5th Cir. 1992) (university police officer's reports of sexual harassment within the police force involved matter of public concern even though officer acknowledged a duty to report sexual harassment, distinguishing *Terrell*).

- **Eighth Circuit:** *Compare Buazard v. Meridith,* 172 F.3d 546, 548-49 (8th Cir. 1999) (police officer's statements about his conversations with witnesses and fired police officers, and his refusal to change those statements at the request of the chief of police, did not involve matter of public concern because there was no indication that plaintiff was taking any action as a concerned citizen and the statements were entirely internal), *with Herts v. Smith,* 345 F.3d 581, 585-86 (8th Cir. 2003) (school district employee's testimony at a hearing regarding a desegregation case involving the school district was on a matter of public concern even though job-related, rejecting defendants' reliance on *Buazard*), *and Belk v. City of Eldon,* 228 F.3d 872, 879-80 (8th Cir. 2000) (city employee's memo to supervisor and conversation with alderman on inappropriate payment of employment benefits addressed matter of public

concern—the misuse of public funds and of her supervisor's public position—even though statements were "unquestionably related to her employment").

- **11th Circuit:** *Compare Morris v. Crow,* 142 F.3d 1379, 1382 (11th Cir. 1998) (deputy sheriff's routine report discussing auto accident investigation not on matter of public concern where nothing in the record indicated that plaintiff's speech "sought to bring to light any wrongdoing or to do more than accurately report an accident"), *with Oladeinde,* 230 F.3d at 1292 (police officers' speech alleging tampering with public records by fellow officers involved matter of public concern because "a core concern of the first amendment is the protection of the 'whistle-blower' attempting to expose government corruption," distinguishing *Morris*) (citation and internal quotation marks omitted), *and Fikes v. City of Daphne,* 79 F.3d 1079, 1084 (11th Cir. 1996) (police officer's report of misconduct arising out of a fellow officer's failure to terminate a high-speed chase that turned fatal raised a matter of public concern because plaintiff sought to expose police misconduct).[4]

Thus, none of the circuits has adopted the per se rule petitioners urge for job-related public employee speech, and none would find that a prosecutor's memorandum and other communications both inside and outside the district attorney's office that seek to expose unlawful conduct by the sheriff's department are exempt from First Amendment protection.

Petitioners point to statements in some circuit decisions in which the courts sought to determine whether the employee's

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[4] In addition, other circuits that petitioners do not mention agree that speech by public employees on topics of public concern satisfies the *Connick* threshold whether or not made in the course of the speaker's job responsibilities. *See, e.g., Baldassare v. New Jersey,* 250 F.3d 188, 196-97 (3d Cir. 2001); *Lewis v. Cowen,* 165 F.3d 154, 163-64 (2d Cir. 1999); *Fox v. District of Columbia,* 83 F.3d 1491, 1494 (D.C. Cir. 1996).

speech in a particular case "was made primarily in the plaintiff's role as citizen or primarily in his role as employee," Pet. 15-16, but these quotations are taken out of context. The citizen-employee formulation is simply a variation on the "point of the speech" inquiry; both are shorthand for whether, based on the speech's content, form, and context, a public employee is speaking on a matter of public concern. For example, in *Kennedy,* the Fifth Circuit ruled that a letter by a library supervisor to the director regarding the need for greater library security measures addressed a matter of public concern, even though it was part of the plaintiff's job to convey such concerns. The court noted that the citizen-employee test it had used in earlier cases produced the "identical conclusion" to the content-form-context test, in that here, the employee "clearly was not speaking upon matters only of personal interest, and indeed she spoke 'primarily in [her] role as citizen.'" *Kennedy,* 224 F.3d at 375; *accord Wilson,* 973 F.2d at 1269 (holding that police officer reporting sexual harassment within the police force spoke on a matter of public concern, even though she had a duty as a police officer to make the report, and thus spoke "both as a citizen and an employee").

The same has held true in the Fourth Circuit. In *Robinson v. Balog,* the court held that employees of a city solid waste division who testified at a public hearing and cooperated with federal investigators on job-related matters "sought to bring to light 'actual or potential wrongdoing or breach of public trust' on the part of government employees," 160 F.3d at 188 (citation omitted), and thus, they "spoke not in their 'capacity as . . . public employee[s],' but as 'citizen[s] upon matters of public concern.'" *Id.* at 189 (citations omitted).

In sum, there is no conflict on the questions presented, and review should therefore be denied.

II. PETITIONERS' PER SE APPROACH WOULD CURTAIL SPEECH ON ISSUES OF CRITICAL PUBLIC INTEREST AND CREATE PERVERSE INCENTIVES.

Petitioners and their amicus claim that if the First Amendment protects job-related public employee speech, the management of most, if not all, public agencies will be crippled. Pet. 18-20; Amicus Br. 3-5. Their fears have no basis and do not justify further review.

Petitioners not only seek to revisit the Court's analysis in *Connick,* in which the Court again "reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection," 461 U.S. at 145, but they are wrong on the likely effect of protecting job-related public employee speech on topics of public importance. The recognition that speech touches on a matter of public concern does not end the analysis; a court must then apply the *Pickering* balance to weigh the employee's and employer's competing interests. Thus, First Amendment protection is *not* "contingent" solely on whether "the speech . . . relates to an issue of public import," Pet. 19, but also depends upon a "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick,* 461 U.S. at 150, as well as "the manner, time, and place" in which the speech is made. *Id.* at 152-53; *see also Rankin,* 483 U.S. at 388. Tellingly, petitioners have not sought review of the Ninth Circuit's application of *Pickering* in this case. That no court of appeals in the country has seen fit to adopt a per se approach belies the alarm petitioners sound regarding the debilitating effects of the necessarily fact-based approach circuits across the country have been employing.

Petitioners never acknowledge that a per se rule exempting First Amendment protection for all public employee speech made in the course of the speaker's employment would unravel decades of jurisprudence by this Court recognizing both the

employee's interest as a citizen in speaking out on public matters—whether or not arising in the course of employment—and the community's equally powerful interest in hearing that speech. As this Court often has observed: "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Connick,* 461 U.S. at 145 (citation omitted); *see also Umbehr,* 518 U.S. at 674 (government employees and contractors "are often in the best position to know what ails the agencies for which they work") (citation omitted). Thus, "[s]ilencing a public employee seeking to speak on a matter of public concern deprives a self-governing society of information that may be vital to informed decision-making." *Azzaro v. County of Allegheny,* 110 F.3d 968, 977 (3d Cir. 1997).

Not only would a per se rule denying protection for all job-related public employee speech curtail much speech by the very individuals in the best position to expose governmental misconduct, corruption, and inefficiency, but it would create perverse incentives. If employees had no First Amendment protection for reporting official wrongdoing when their reports were submitted pursuant to job responsibilities, then there is no doubt that employers would broaden their immunity by the simple expedient of adding to their employees' reporting duties. *See Wilson,* 973 F.2d at 1269 (rule that reports of sexual harassment made pursuant to plaintiff's duties are exempt from First Amendment protection "could ironically facilitate the suppression of speech through a requirement that the speech be made"); *accord Kennedy,* 224 F.3d at 370.

Likewise, as the Ninth Circuit here and many other courts of appeals have recognized, a ruling that public employee speech counts as "citizen speech" only if the employee "goes public" with his charges—a rule to which the logic of petitioners' position leads—creates an incentive for employees to take every accusation of wrongdoing directly to the press instead of discreetly pursuing internal channels. Pet. App. 13-14; *see also Lee,* 197 F.3d at 1296 n.1; *Hulbert,* 120 F.3d at

654 ("We find it hard . . . to believe that the county would have preferred his going immediately to the local newspapers and television stations with his information. Hulbert is, if anything, to be commended for attempting to go through the County's established internal channels . . . ."); *Fox,* 83 F.3d at 1494 ("An employee is not constitutionally penalized for making a sensitive report discreetly and without fanfare, or for failing to elicit the media's interest."); *Thompson,* 901 F.2d at 467 (denying protection for speech alerting superiors of grievances instead of the public "would mean that loyal employees seeking to rectify problems would lose constitutional protection for attempting to correct problems inhouse"). As this Court has recognized: "Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan,* 439 U.S. at 415-16; *accord Roe,* 125 S. Ct. at 526; *Rankin,* 483 U.S. at 387 n.11.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

Bonnie I. Robin-Vergeer
Counsel of Record
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Humberto Guizar
Law Offices of Humberto Guizar
3500 West Beverly Boulevard
Montebello, CA 90640
(323) 725-0917

Counsel for Respondent

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GIL GARCETTI, *et al.*,

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

CINDY S. LEE, State Bar No. 168941
Counsel of Record
JIN S. CHOI, State Bar No. 180270
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Telephone (818) 545-1925

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CONSTITUTION

First Amendment ..... *passim*

PETITIONERS' REPLY BRIEF

Respondent contends that this Petition for Writ of Certiorari should be denied because there is no inter-circuit conflict on the question at hand: whether a public employee's speech expressed strictly pursuant to the duties of employment – as opposed to speech expressed pursuant to the rights of citizenship – is protected by the First Amendment. Notwithstanding Respondent's contention that the circuits have developed a uniform approach and answer to this question, review of the relevant legal landscape demonstrates, without question, the *absence of this purported consensus*. Indeed, in the two decades since this Court's decision in *Connick v. Myers*, there have been many decisions on either side of the fence, embroiling a majority of the circuits. This inter-circuit conflict has certainly burned long enough to warrant review by this Court.

In the Opinion below, the Ninth Circuit gave no weight to the fact that the subject speech was purely job-related and not expressed in conjunction with the exercise of Respondent's rights as a citizen.[1] Under the Ninth Circuit's approach, any speech that relates to a matter of public concern is constitutionally protected, even if there is no inkling of "citizen speech." However, not all courts have adopted this approach, thereby maintaining the vitality of "citizen speech" in this constitutional equation. Notably, in his special concurrence below, Judge O'Scannlain discussed at length the *absence of consensus among the circuits* on this very point and the need for review by this Court. Appendix A at 38-40, 50-51.

Respondent's contrary contention that the circuits have reached a level of harmony that should not be disturbed is based on a convenient self-serving premise: every case which conflicts with the holding below is factually

[1] Respondent's suggestion that he met with the Mexican-American Bar Association *prior* to the alleged acts of retaliation is not supported by the record. *See* Respondent's Opposition (hereinafter "Opp.") at 2.

distinguishable and therefore not a sign of inter-circuit conflict; every case which is consistent with the holding below is factually indistinguishable and therefore a sign of "overwhelming consensus." Opp. at 11. As discussed below, Respondent's cursory discussion of the cases illustrative of the inter-circuit conflict does not withstand the most basic scrutiny.

I. RESPONDENT GROSSLY EXAGGERATES THE PURPORTED INTER-CIRCUIT CONSENSUS ON WHETHER PURELY JOB-RELATED SPEECH IS CONSTITUTIONALLY PROTECTED.

The conflict among the circuits regarding the treatment of speech expressed strictly pursuant to the duties of public employment is understandable since this Court has not yet identified where this very common type of public employee speech falls within the *Pickering-Connick* matrix. What has been made clear in this construct is that a public employee's speech *is not protected* when the employee speaks as an employee regarding a personal interest, and *is protected* when the employee speaks "as a citizen upon a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 147 (1983). Thus, what has been unanswered is whether a public employee is entitled to First Amendment protection whenever he speaks about a matter of public concern, with no regard to whether the employee is speaking "as a citizen" or pursuant to the duties of his or her public employment. While the Ninth Circuit has held that speaking about a matter of public concern, in and of itself, triggers the First Amendment in every instance, this position has not been uniformly embraced.

Respondent downplays the continuing inter-circuit conflict by alluding to purported factual distinctions and incomplete descriptions of unfavorable holdings. For instance, in discussing *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001), Respondent takes a dismissive approach even while acknowledging that the speech in *Gonzalez* involved "a police officer's official reports

discussing *police misconduct*, pursuant to his duties to investigate alleged misconduct." Opp. at 12, emphasis added. Respondent's assertion that *Gonzalez* is reconcilable with the Opinion below is unsupported by any substantive discussion of the analysis in *Gonzalez*. Respondent's cursory discussion of *Gonzalez* is not surprising in light of the significant factual parallels between *Gonzalez* and the instant case. Indeed, just as in *Gonzalez*, the subject speech in the instant case was expressed in the form of an official report (a routine disposition memorandum), pertained to alleged police misconduct and was prepared pursuant to Respondent's normal job duties.[2]

Another factually analogous case that Respondent attempts to devalue is *Thompson v. Scheid*, 977 F.2d 1017 (6th Cir. 1992), a case involving speech regarding misconduct by a public official. *See* Opp. at 21. In *Thompson*, the plaintiff, a county fraud investigator, investigated a county commissioner who may have improperly received public funds. *Thompson*, 977 F.2d at 1019. After his investigation, the plaintiff prepared a report which was forwarded to the county prosecutor, and afterward, the plaintiff spoke with agents from both the Office of Inspector General and the FBI. *Id*. The plaintiff was then warned by his supervisors that he was bound by confidentiality rules and "not to act without following Department policies and procedures." *Id*. No charges were filed against the county commissioner. *Id*. Subsequently, after receiving a written reprimand and accepting a position with another state agency, the plaintiff brought a section 1983 action against

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[2] Respondent attempts to deflect this Court's attention from *Gonzalez* by quoting the Seventh Circuit's comment that *Gonzalez* should be limited "to routine discharge of assigned functions, where there is no suggestion of public motivation." *Delgado v. Jones*, 282 F.3d 511, 519 (7th Cir. 2002); Opp. at 13. Even under this standard, however, Respondent's disposition memorandum (and discussion of same with his co-workers and supervisors) would not be entitled to First Amendment protection since the speech was indisputably made pursuant to his regular job duties, in direct conjunction with his prosecutorial obligations, not as an expression of "public motivation."

the county commissioner, his supervisors and the Department, alleging that he had been retaliated against for having exercised his First Amendment rights. *Id.* at 1019-20. The Court of Appeals held that the district court did not err in finding that the plaintiff's investigation "did not constitute speaking out on an issue of public concern and did not warrant First Amendment protection." *Id.* at 1020. Significantly, the *Thompson* Court rejected the plaintiff's contention that his communications related to his investigation were constitutionally protected because the investigation involved alleged fraud by the county commissioner, by focusing on the *job-related* nature of these communications:

> We find that plaintiff's conversations with [his supervisors] about the investigation, their reminder to plaintiff that his investigation was confidential, and their warning not to pursue the matter without going through appropriate Department procedures *concern plaintiff's duties as an employee of the Department*. Therefore, these conversations concern matters of internal department policy and *cannot be considered speaking out on matters of public concern*.

Id. at 1021 (emphasis added).

The legal analysis in *Thompson* is especially probative due to the similarity in facts, with respect to the nature of the speech involved, with not only the instant case but with *Gonzalez* and *Roth v. Veteran's Administration*, 856 F.2d 1401 (9th Cir. 1988) – the case on which the Court below relied in finding that Respondent's disposition memorandum was constitutionally protected. Thus, *Thompson* is another case, from yet another circuit, which demonstrates the necessity of review of the instant Petition.

Not only does Respondent fail to establish how there can be an "overwhelming consensus" in light of *Thompson* and *Gonzalez*, he also fails to provide any meaningful response to the Fourth Circuit's in-depth examination of *the role of citizen speech*, in *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc).

> The *threshold inquiry* thus is whether the Act regulates speech by state employees *in their capacity as citizens* upon matters of public concern. If a public employee's speech made in his capacity as a private citizen does not touch upon a matter of public concern, the state, as employer, may regulate it without infringing any First Amendment protection. [Citations.] To determine whether speech involves a matter of public concern, we examine the content, context, and form of the speech at issue in light of the entire record. *See Connick*, 461 U.S. at 147-48, 103 S.Ct. 1684. . . . Further, the place where the speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace. [Citations.] *The Supreme Court has made clear that the concern is to maintain for the government employee the same right enjoyed by his privately employed counterpart.* To this end, in its decisions determining speech to be entitled to First Amendment protection the Court has emphasized the *unrelatedness of the speech at issue to the speaker's employment duties.* [Citations.] Thus, critical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is "made primarily in the [employee's] role as citizen or primarily in his role as employee." *Terrell*, 792 F.2d at 1362; [citations].

Id. at 406-07 (emphasis added).[3]

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[3] The thoughtful analysis in *Urofsky* even includes the description of a hypothetical situation remarkably similar to the facts of this case:

> This focus on the capacity of the speaker recognizes the basic truth that speech by public employees undertaken in the course of their job duties will frequently involve matters of vital concern to the public, without giving those employees a First Amendment right to dictate to the state how they will do their jobs. For example, *suppose an assistant district attorney, at the District Attorney's direction, makes a formal*

(Continued on following page)

This insightful exposition of the importance of the citizen speech element is not only consistent with the fundamental considerations at the heart of the *Pickering* rationale, but also brings focus to a practical reality ignored in the Opinion below – if the element of citizen speech is excised from this analysis, public employees will be afforded First Amendment protection for purely job-related speech while employees performing similar functions in the private sector will not. Consequently, public employees' access to the First Amendment will far exceed that of private employees whose speech will only be protected only when exercising their rights of citizenship in the public domain. This would constitute a dramatic (and unjustified) departure from the clear purpose of *Pickering* – to allow public employees to enjoy the same degree of First Amendment protection as those citizens who are privately employed.

These three cases, from three different circuits, in and of themselves represent compelling evidence of an entrenched inter-circuit conflict and the absence of the "overwhelming consensus" touted repeatedly by the Respondent without just foundation.[4] Moreover, *Gonzalez, Thompson* and *Urofsky* are hardly alone in their recognition that citizen speech and a public employee's entitlement to First

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statement to the press regarding an upcoming murder trial – a matter that is unquestionably of concern to the public. It cannot seriously be doubted that the assistant does not possess a First Amendment right to challenge his employer's instructions regarding the content of the statement. In contrast, when the same assistant district attorney writes a letter to the editor of the local newspaper to expose a pattern of prosecutorial malfeasance, the speech is entitled to constitutional protection because it is made in the employee's capacity as a private citizen and touches on matters of public concern.

Id. at 407-08 (emphasis added, footnote omitted).

[4] Respondent's contention that *Urofsky* should not be treated as a sign of an inter-circuit conflict is also contradicted by the Opinion below, in which the Ninth Circuit conceded that its holding was not consistent with *Urofsky*. *See* Appendix A at 16, n. 7.

Amendment protection are inextricably tied. *See Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 (5th Cir. 1986) ("Because almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.") (emphasis in original); *DiMeglio v. Haines*, 45 F.3d 790, 805 (4th Cir. 1995) (holding that the defendant was entitled to qualified immunity because he reasonably could have believed that the plaintiff's speech was not protected since "it is at least questionable whether [the plaintiff]'s comments, *spoken within his public role and concerning a matter within the scope of his responsibilities*, were protected expressions upon which a retaliation claim could be based") (emphasis added); *Holland v. Rimmer*, 25 F.3d 1251, 1255-56 (4th Cir. 1994) (finding that the subject speech was not protected where the subject statements "were made as a supervisory employee to other employees, not as a citizen speaking out to the public about matters of public concern."); *see also* the cases cited in the Petition at 15-16.

Even cases published within the last year reflect the continuing nature of the inter-circuit conflict and the absence of uniformity in the approach used to calculate this constitutional equation. *See Sheaffer v. County of Chatham*, 337 F.Supp.2d 709, 718 (M.D.N.C. 2004) ("critical in ascertaining whether the speech was made *primarily in the plaintiff's role as employee or primarily in her role as citizen.*") (emphasis added); *cf. Coleman v. Board of Educ. of City of St. Louis*, 324 F.Supp.2d 1048, 1058 (E.D.Mo. 2004) ("In *Connick*, the Supreme Court explained that the key question is not whether the person is speaking in his role as an employee or a citizen, but whether the employee's speech in fact touches on a matter of public concern."). Thus, the cases discussed

above and in the Petition have contributed to a growing tapestry of cases that lacks the thread of consistency necessary to prevent future irreconcilable decisions involving First Amendment claims by public employees based on purely job-related speech. Indeed, the divergent opinions of the past two decades will most likely prevent the development of the "overwhelming consensus" about which Respondent prematurely speaks.

Review by this Court, therefore, will serve a timely and edifying purpose – not only by filling a significant gap in First Amendment jurisprudence but by educating thousands of public employers and their hundreds of thousands of employees.[5]

II. IN ADDITION TO ADDRESSSING THE ESTABLISHED INTER-CIRCUIT CONFLICT, REVIEW IS NECESSARY TO CARRY OUT THE FUNDAMENTAL PURPOSE OF THIS COURT'S HOLDING IN *PICKERING*.

Respondent does not discuss the historical context in which *Pickering v. Board of Education*, 391 U.S. 563 (1968) was decided, and this Court's repeated recognition of that important context in *Connick*, fifteen years later.

Only after this Court's decision in *Pickering* were public employees entitled to any First Amendment protection at all. Prior to *Pickering*, public employees, by virtue of their public employment, were deprived entirely of First Amendment protection. At the same time, *Pickering* did not open the door to First Amendment protection so

[5]. This Court's recent decision in *City of San Diego v. Roe*, 125 S.Ct. 521 (2004) (reversing the Ninth Circuit's holding that a police officer's sexually explicit speech, engaged in while off-duty, was constitutionally protected since it involved a matter of limited public concern), did not address the question raised here – whether a public employee's speech expressed purely pursuant to his or her job duties is entitled to First Amendment protection.

widely. Instead, First Amendment protection was clearly tied to the very public nature of the subject speech. *Pickering*, 391 U.S. at 574 ([where] "*the fact of employment is only tangentially and insubstantially involved* in the subject matter of the public communication made by a teacher, we conclude that *it is necessary to regard the teacher as the member of the general public he seeks to be*."). Thus, in *Pickering*, this Court did not afford First Amendment protection simply because the speech pertained to a matter of public concern but identified as significant factors 1) the relationship between the speech and the speaker's employment and 2) the speaker's intent to be treated as a citizen – and not as an employee.

That the holding in *Pickering* was deeply rooted in the relevant historical backdrop is evident from this Court's comments in *Connick*: "The explanation for the Constitution's special concern with threats to *the right of citizens to participate in political affairs* is no mystery. The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . *Pickering* . . . *followed this understanding of the First Amendment.*" *Connick*, 461 U.S. at 145 (emphasis added).

Indeed, this Court's comments in both *Pickering* and *Connick* demonstrate the substantial link between the extent of First Amendment protection afforded to public employees and the reality prior to *Pickering* – a longstanding era during which public employees did not have the freedom to engage in the interchange of ideas and public debates most emblematic of the First Amendment rights bestowed on every citizen of this country. This significant link, however, is rendered meaningless under the Ninth Circuit's approach since endowing purely job-related speech with First Amendment protection does not advance the fundamental concerns that finally broke down the wall that had kept all public employees in a state of First Amendment oblivion.

This disconnect between the underlying, fundamental concerns identified in *Pickering* and the breadth of First

Amendment protection in the public employment setting has been cemented in the Ninth Circuit, and others. At the same time, this disconnect has been recognized and prevented from taking root in circuits where a more historically sensitive approach – punctuated by a more intricate interpretation of *Pickering* and *Connick* – has been adopted in assessing whether job-related speech is constitutionally protected. Before these divergent paths become even more entrenched, Petitioners urge this Court to take this opportunity to address this important issue of law.

CONCLUSION

The Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

CINDY S. LEE, State Bar No. 168941
Counsel of Record
JIN S. CHOI, State Bar No. 180270
FRANSCELL, STRICKLAND, ROBERTS
& LAWRENCE
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Telephone (818) 545-1925

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Supreme Court of the United States

OCTOBER TERM, 2004

GIL GARCETTI, *et al.*, *Petitioners*

v.

RICHARD CEBALLOS, *Respondent*

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

Naomi Gittins*
Julie Underwood
Lisa Soronen
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

Thomas E. Wheeler, II
Locke Reynolds, LLP
201 N. Illinois Street, Suite 1000
Indianapolis, IN 46204
(317) 237-3800

*Counsel of Record

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of 49 state associations of school boards across the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia, and the U.S. Virgin Islands. NSBA also represents the nation's 95,000 school board members who, in turn, govern approximately 15,000 local school districts that serve more than 47 million public school students. NSBA is dedicated to the improvement of public education in America and has long been involved in advocating for a reasonable balance between the legitimate First Amendment rights of public employees to speak out on matters of public concern, and the obligation of schools as public employers, to promote the efficiency of the educational system.

NSBA submits this brief to emphasize the significant adverse impact that the Ninth Circuit's decision, if left intact, would have on the operation of our nation's schools.

SUMMARY OF THE CASE

This case was brought by an assistant prosecutor in Los Angeles, Richard Ceballos, who as a result of his own investigation believed that a

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[1] This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

sheriff had lied in an affidavit to obtain a search warrant. He wrote a memorandum outlining his beliefs and recommending that the case be dismissed. After a meeting involving the district attorney's office and the law enforcement agency, his supervisor took a different view of the case and instructed Ceballos to change the memorandum. The memorandum was then turned over to defense counsel, and Ceballos testified for the defense. The court found no reason to invalidate the warrant. Subsequently, Ceballos was demoted and received undesirable assignments. He sued his employer, the Los Angeles District Attorney, claiming retaliation for his speaking out on a matter of public concern. The district court ruled in favor of the employer, but the Ninth Circuit Court of Appeals reversed, holding that Ceballos's speech (in the memo) was protected by the First Amendment right of free expression, regardless of the fact that the speech was in fulfillment of his job duties.

SUMMARY OF THE ARGUMENT

The distinction this Court has drawn in its First Amendment jurisprudence between speech uttered as citizen and that expressed as a public employee should be applied to speech made in fulfillment of a public employee's job duties, even if the expression touches on a matter of public concern. In making this determination, this Court should eschew the Ninth Circuit's approach which makes the content of the speech the sole determining factor of whether the expression falls within the scope of First Amendment protection. *Amicus* urges this

Court to retain consideration of the context and form of expression in determining that speech made in pursuit of a public employee's job responsibilities is not entitled to the same constitutional protection as speech expressed as a citizen. This approach will not compromise any of the values underlying the First Amendment's free speech protection and will permit public schools to regulate the speech of their employees who are retained to carry out the schools' educational mission. This is particularly important for schools in implementing their policy decisions regarding curriculum. Schools should be able to discipline or terminate employees who refuse to execute their responsibilities in the manner prescribed by the school board without undue fear of First Amendment claims based on speech made in fulfilling the employees' job duties, that happens to implicate a matter of public concern.

ARGUMENT

I. The employee/citizen distinction drawn by this Court in *Pickering* and *Connick* is critical to reaching an appropriate balance between efficient operation of public schools and the First Amendment rights of school employees.

This Court's First Amendment jurisprudence on the free speech rights of public employees provides the core principles that should guide its decision in this case with respect to speech made pursuant to a public employee's job duties. In *Pickering v. Board of Educ. of Township H.S. Dist.*

205, 391 U.S. 563, 568 (1968), this Court held that the First Amendment requires "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." In *City of San Diego v. Roe*, 125 S. Ct. 521 (2004), this Court further explained that: "*Pickering* did not hold that any and all statements by a public employee are entitled to balancing. To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices." *Id.* at 525, *citing Connick v. Myers*, 461 U.S. 138 (1982). The Court properly identified the interests of public employees in retaining their interests *as citizens* to speak on matters of public concern and the interest of the government in maintaining the efficient operation of its agencies.

In *Pickering,* a teacher was dismissed after writing a letter to a newspaper that was highly critical of the school board and certain administrators in connection with their handling of a bond issue and allocation of those funds "between the schools' educational and athletic programs." 391 U.S. at 566. The teacher challenged his termination, contending that his speech was protected under the First Amendment. This Court agreed, stating that: "teachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy *as citizens* to comment on matters of public interest in connection with the operation of

the public schools in which they work." *Id.* at 568 (emphasis added).

Thus, *Pickering* established that where an employee speaks as a citizen that speech may fall within the scope of First Amendment protection. This Court contrasted that situation with one where the public employee is speaking in his or her role as a public employee:

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the teacher as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id.

In *Pickering,* this Court found that the teacher was speaking on his own time as a citizen and thus the speech was protected: "[I]n a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by the teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be." *Id.* at 574. In so concluding,

this Court established distinct parameters for First Amendment protection—public employees, by virtue of their employment, should not be deprived of First Amendment protection when the subject speech is expressed pursuant to the exercise of the rights of citizenship, as opposed to speech expressed in accordance with the responsibilities of public employment.

These parameters were reaffirmed fifteen years later in *Connick v. Myers*, 461 U.S. 138 (1982). In ruling against an assistant district attorney who had circulated a questionnaire among her co-workers, soliciting opinions on a variety of matters related to the work environment at her office, this Court noted again that the central inquiry involved balancing the public employer's legitimate interest in an efficient workplace environment against the public employee's interest in commenting on matters of public concern "as a citizen." *Id.* at 140. This Court stated:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter.
>
> * * *

> The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment "was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Connick, 461 U.S. at 143 *citing Pickering*, 391 U.S. at 568.

The *Connick* decision ultimately turned on this factor: "We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; ... ." *Id.* at 147 (citations omitted).[2]

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[2] Since *Pickering*, this Court has not wavered from the pronouncements regarding the importance of "citizen speech." *See Perry v. Sindermann*, 408 U.S. 593 (1972)(finding protected a public college professor's testimony before a state legislature); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)(finding protected a public school teacher's communication with a radio station regarding the school's dress code for teachers); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (finding protected a teacher's private remarks with a supervisor regarding the school district's allegedly racially discriminatory policies); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)(stating "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse...."); *United States v.*

What is apparent from these cases is that the role of the speaker as a citizen or employee is equally as important as the content of the speech when determining whether First Amendment protection should be afforded. The Ninth Circuit decision below errs by focusing solely on the content of the speech and giving no consideration to the role of its speaker. *Pickering* and *Connick* make clear that the First Amendment does not protect individuals who are speaking as *public employees* on matters that are personal in nature. For the reasons explained more fully below and in Petitioners' brief, *amicus* NSBA urges this Court to reach the same result with respect to public employee expression made in the course of fulfilling official job duties or functions. None of the principles underlying the First Amendment would be compromised by doing so, and public schools would be better able to fulfill their mission of educating our nation's children according to educational policies established by school boards accountable to the electorate.

National Treasury Employees Union, 513 U.S. 454, 465 (1995) (in holding unconstitutional the prohibition of government employees from receiving honoraria, this Court stated that the employees "seek compensation for their expressive activities in their capacity as citizens" and the speeches lack "relevance to their employment.").

II. The Ninth Circuit's ruling unreasonably interferes with the ability of public schools to control the speech of their employees who are tasked with fulfilling the schools' educational mission.

Public agencies are created by statutes to fulfill specific purposes. In the course of public employment, numerous decisions, both big and small, have to be made regarding what tasks should be accomplished and in what manner to fulfill the mission of the agency. For example, in a school district, someone must decide what classes to offer, what type of student behavior warrants discipline, how to implement a special education program, etc.. These decisions are typically made by the school board as the employer who then hires employees to carry out the board's decisions.

This Court has recognized that public employers need to be able to hire employees who are willing to fulfill the mission of the public employer in the manner which the public employer prescribes. In *Waters v. Churchill*, 511 U.S. 661, 675 (1994), the Court stated:

> [C]onstitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign. The restrictions discussed above are allowed not just because the speech interferes with the government's operation.

Speech by private people can do the same, but this does not allow the government to suppress it.

Rather, the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the governor may, in the example given above, fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.

Lower courts have also considered whether an employee's speech reflects unwillingness to conform to the expectations of the employer in determining if speech is protected by the First Amendment. *See, e.g., Urofsky v. Gilmore III*, 216 F.3d 401, 409 (4th

Cir. 2000) ("It cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their position in a specified way."); *Wales v. Board of Educ. of Cmty. Unit Sch. Dist. 300*, 120 F.3d 82 (7th Cir. 1997) ("A school is entitled to insist that its staff carry out the educational philosophy espoused by the elected school board and the principal the board appoints. A Montessori school need not employ teachers who hanker for stern discipline. A memorandum proclaiming support for a disfavored educational approach (removing or disciplining disruptive kids) may be useful to a school in determining how a teacher runs her classroom.").

The Ninth Circuit's ruling, which only looks at the content of the speech (*i.e.*, is the topic of the speech one of public concern) rather than the form, content, and context of speech, fails to consider any factors which could indicate whether the employee was truly acting as a citizen, interested in informing the public on a matter of importance, or an employee who disagrees with how he or she has been directed to do his or her job. In short, under the Ninth Circuit's ruling, public schools could be forced to endure an endless litany of complaints by disgruntled employees—and the likely poor performance that would accompany such complaints—or else risk claims of retaliation based on the First Amendment should the board take action against the vocal employee. Such a result would hamper a public employer's ability to carry

out its mission and is contrary to the precedent of this Court.

III. The ability of public school boards to control school curriculum would be significantly undermined if school employees receive First Amendment protection for speech about any matter of public concern uttered in a classroom.

A. Courts have long recognized the authority of schools to control the content of their curricula, including speech that bears the schools' imprimatur.

Nowhere is the effect of the Ninth Circuit's flawed analysis on a public employer's control of speech made on its behalf more troublesome than in the context of classroom speech by teachers. By adopting a *per se* rule that public employee speech on a matter of public concern is protected by the First Amendment, the ruling below arrogates control of the classroom and the curriculum from school boards to teachers.

Schools have been at the forefront of the public employee free speech debate since this Court's seminal decision in *Pickering*. This is not surprising since teachers are, by the very nature of their jobs, paid to speak. However, given the young, captive audience and the schools' educational mission, it is extremely important that school boards retain control over speech made to these impressionable students. For this reason, Justice Frankfurter noted

that curricular control was one of four "essential freedoms" of a public educational institution: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 263-264 (1957).

Recognizing the essential freedom of a school to determine for itself what may be taught in its classrooms, this Court has acknowledged on many occasions both the authority and the obligation of schools to control what is said and done under their auspices, both by students, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); and teachers, *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983). Of particular concern to this Court is the power of school-sponsored speech not only to educate young students, but also to inculcate values and beliefs.

> As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions . . . (citations omitted) recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing

> more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

Lee v. Weisman, 505 U.S. 577, 592 (1992).

Because speech in schools holds such power to shape and influence young people's lives, this Court's precedent indicates that our nation's schools, as employers, have wide discretion to restrict teacher speech in the classroom because such speech will be perceived by students as bearing the imprimatur of the schools. "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern." *Adler v. Board of Educ.*, 342 U.S. 485, 493 (1952). Thus, it is crucial that schools have the authority to ensure that teachers impart appropriate information to students in a manner that does not depart from the established curriculum.

Recognizing these interests, this Court in *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260 (1988), acknowledged the broad authority school boards have to select curriculum and ensure that it is taught. In that case, this Court upheld a principal's decision to remove from a school-sponsored newspaper two stories about pregnancy and divorce. One of the reasons the principal disallowed publication of the articles was his belief that the articles' references to sexual activity and

birth control were inappropriate for the younger children in the school. This Court concluded that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.[3]

While *Hazelwood* concerned student speech, this Court indicated that the same principles that govern a school's ability to control student speech would also apply to employee speech that might be seen to bear the imprimatur of the school. "If the [school] facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." 484 U.S. at 267, *citing Perry Educ. Ass'n v. Perry Local Educ. Ass'n,* 460 U.S. at 46 n.7. Thus, school districts may control school-sponsored speech regardless of

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[3] Judicial deference to curricular decisions was also reiterated in *Board of Educ. v. Pico*, 457 U.S. 853 (1982), where this Court noted the great hesitancy with which courts should embroil themselves in the curriculum and classroom: "As this case is presented to us, it does not involve textbooks, or indeed any books that Island Trees students would be required to read. Respondents do not seek in this Court to impose limitations upon their school board's discretion to prescribe the curricula of the Island Trees schools. On the contrary, the only books at issue in this case are library books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there." *Id.* at 862.

whether it comes from the mouths of students publishing the school newspaper, or from teachers selecting the school play.

Numerous lower court decisions have held that the authority to choose the curriculum lies with the school board, not its employees. For example, in *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994), the court held a school district did not violate a biology teacher's Establishment Clause rights by making him teach evolution nor his free speech rights by ordering him to refrain from discussing his religious beliefs during instructional time and to tell any students who attempted to initiate such conversations with him to speak to their parents or clergy. In *Board of Educ. of Jefferson County Sch. Dist. R-1*, 960 P.2d 695 (Colo. 1998), a teacher was dismissed for showing the film *1900* (an R-rated film) without prior approval from the principal. The Colorado Supreme Court held that: (1) the policy requiring prior approval was related to a legitimate pedagogical concern; and (2) the teacher was not entitled to actual notice of the policy because the controversial content of the film, *i.e.*, violence, drug use, nudity, and sex acts, should have alerted the teacher to seek prior approval. *See also, Boring v. Buncombe,* 136 F.3d 364 (4th Cir.), *cert. denied*, 525 U.S. 813 (1998). In *Newton v. Slye*, 116 F.Supp.2d 677 (W.D. Va. 2000), after a parent complained, a high school principal ordered an English teacher to remove from the outside of the classroom door a pamphlet containing a list and description of banned books. The principal informed the teacher that the pamphlet potentially compromised the school's current curriculum

promoting family values, character development, and abstaining from drug use. The court held that even assuming that the teacher's posting of the pamphlet on the classroom door was considered protected speech, the principal did not violate the teacher's free speech rights, because the pamphlet impeded the school district's countervailing interest in teaching a curriculum based on community values previously approved by the school board.

The Ninth Circuit's decision in this case ignores this long established precedent and effectively strips schools of the ability, as an employer, to control their employees' speech in the classroom—speech which is not only attributable to them but also is the primary means necessary to carry out their governmental function of educating children.

B. Classroom expression by teachers by its very nature bears the school's imprimatur and is quintessential employee speech that the First Amendment does not protect.

By creating a *per se* rule that all public employee speech that relates to a matter of public concern is automatically entitled to First Amendment protection, the Ninth Circuit's decision fails to look at the form, content, and context of the speech and to consider whether the employee was acting as a citizen when he or she spoke at school or was in fact carrying out the responsibilities of a teacher for which he or she is employed by the district. Such an outcome effectively cedes control of

the curriculum from the schools to individual teachers and gives them a constitutional right to define, at least in part, the school's curriculum, over the informed judgments of both school boards and parents.[4] Such a right, "in the context of a curricular activity could unduly constrain the ability of educators to educate." *Hazelwood*, 484 U.S. at 273 n. 6. In short, the Ninth Circuit's decision effectively holds that "the Federal Constitution compels . . . elected school officials to surrender control of the American public school system to [individual teachers' personal preferences]." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969)(Black, J. dissenting).

Such a result is contrary to this Court's rulings and would allow teachers to transform classrooms from places where planned and structured teaching takes place into free-for-all forums where teachers may expound with impunity on countless issues of public concern that have little or no relevance to the curriculum mandated by the school board. For example, these issues might include whether the district's discipline policy is effective, whether the school board is doing enough to ensure teacher and student safety, which candidate should be elected to the school board, etc.

[4] This result, coming as it does from the Ninth Circuit, is paradoxical as the Ninth Circuit has repeatedly noted that "the curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere." *See, e.g., Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002). Yet the Ninth Circuit's decision below has stripped the school of this authority and given it instead to school employees.

Allowing teachers to don the mantle of First Amendment protection and diverge in this manner from the established curriculum and espouse their views on any subject related to a matter of public concern would severely hamper a school's ability to fulfill its mission of educating students on the selected curriculum. It clearly illustrates why content cannot be the sole determinant of the protected status of public employee expression that occurs in the workplace. In the examples described above, if the context and form of expression are considered, it becomes obvious that such expression by a teacher would not warrant constitutional protection as speech by a citizen; the expression is uttered in a classroom during school hours in a form and manner virtually indistinguishable from the way in which a teacher would carry out his or her official responsibility to instruct students. In other words, the teacher's speech would be as an employee, not as a citizen.

In addition to protecting classroom speech that is irrelevant to the mandated curriculum, the Ninth Circuit's ruling would also permit teachers under the cloak of free speech protection to discuss in the classroom issues of public concern that are relevant to the curriculum but from a perspective with which the school district disagrees, thereby supplanting a school's policy choices with the teacher's own. For example, a health teacher assigned to teach sex education might object to a school district's abstinence-only approach. The school's choice of this curriculum is undoubtedly a subject of public concern. Under the Ninth Circuit's ruling, if the teacher expressed opposition to the

abstinence-only policy to students in class and then proceeded to teach about how to use contraceptives, the teacher could assert First Amendment protection if the district disciplined him or her for failing to follow the district's chosen curriculum. This example illustrates the problems that arise from focusing solely on the content of speech and failing to look at whether the speaker was acting as a citizen when he or she spoke. Again, if context and form are considered, then the distinctions are obvious between this scenario and one in which the same teacher were to express his or her concerns directly to a supervisor or to write a letter to the community newspaper describing his or her viewpoint about abstinence-only sex education.

Practically speaking, it is difficult to imagine a scenario when a public school teacher could be acting as "citizen" when discussing a matter of public concern with students in the classroom.[5] The importance of context and form cannot be gainsaid. Students, unlike school administrators, school board members, or the adult electorate, are not in a position to change or even necessarily influence curriculum choices. In other words, classroom speech by teachers to students about matters of public concern is unlikely to promote any of the purposes generally associated with granting public

[5] The scenarios in this brief can easily be contrasted with those in *Pickering* and *Givhan*. In those cases, the teachers were talking to an audience in a position to do something about the problem the teacher perceived. In *Pickering* the teacher wrote a letter to the editor about how the district was spending money when citizens were preparing to vote on a bond issue. In *Givhan* the teacher complained to the school principal about the racially discriminatory practices in the district and in the school where she was employed.

employees protection for speech on a matter of public concern, such as keeping the public informed, initiating or contributing to robust public debate, or causing an institutional change. This being true, speech made by a teacher in the classroom warrants no constitutional protection.

It is possible—even likely—that the speech in the examples above would not be constitutionally protected under the balancing test described in *Pickering* which considers the interests of the employee, "as a citizen, in commenting upon matters of public interest and the interest of the State, as employer, in promoting the efficiency of the public services it performs through it employees." But such cases should not even require courts to engage in the balancing test. When speaking in the capacity of a public employee carrying out his or her job duties, a teacher's speech does not become that of a citizen merely because its content happens to touch on a matter of public concern. When a teacher speaks in a classroom to his or her students during the school day, he or she is undoubtedly speaking in fulfillment of his or her employment responsibilities; it is speech in which any interests the teacher may have as a citizen are displaced by her obligations as a public employee. The First Amendment simply does not protect such expression.

IV. Failing to consider whether a teacher's speech about a matter of public concern was made while acting as a citizen is overly burdensome for school districts because every such statement could be the basis of a constitutional claim.

Numerous public employees, like teachers and other school employees, cannot carry out their job duties without engaging in speech at work. Virtually all of them will at some point in the course of doing their jobs discuss a matter of public concern. This means that if the Ninth Circuit's ruling remains intact, almost every school employee facing discipline or termination will be able to assert a First Amendment claim that this speech is in fact the basis for the adverse employment action, as long as the employee alleges a connection between the adverse action and the prior speech. In many cases, the trial court will find sufficient disputed facts (as to whether the subject speech was disruptive enough to justify the employment action in question) so that the claim cannot be resolved until trial. The difficulties that school districts and other public employers will face in having these claims dismissed on summary judgment will, in turn, inflate the settlement value in almost every case.

Public school employees may even be able to manufacture First Amendment claims when they see "the writing on the wall" that an adverse employment action is likely. Teachers are often

protected by state statutes[6] and collective bargaining agreements[7] that give teachers a right to continued

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[6] In almost all states, a combination of state statutory and case law grants tenure to teachers who have been teaching for two or three years. See Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 1998 (1998), *available at* http://www.ecs.org/clearinghouse/14/41/1441.htm; EDWIN BRIDGES, MANAGING THE INCOMPETENT TEACHER 2 (Education Resources Information Center 1990). This property right to continuous employment, which is protected by the Fourteenth Amendment of the Constitution, guarantees teachers significant substantive and procedural due process rights in the event of attempted dismissal. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). In terms of substantive rights, local school districts frequently can terminate tenured teachers only under extreme and statutorily defined conditions. *See* Education Commission of the States, *supra*; BRIDGES, *supra*. While these criteria vary by state, typical grounds for dismissal include incompetence, immorality, insubordination, and neglect of duty. *See id.* The procedural rights guaranteed by state statutes and case law likewise vary among jurisdictions. Generally, however, a tenured teacher is entitled to timely and adequate notice of the reasons for dismissal, a fair hearing with legal counsel before the school board, an opportunity to cross-examine witnesses, and an impartial decision based solely on the evidence presented. *See* BRIDGES, *supra*; David M. Pederson, Statutory Dismissal of School Employees, in TERMINATION OF SCHOOL EMPLOYEES: LEGAL ISSUES AND TECHNIQUES 10-1-10-2 (National School Boards Association 1997). Moreover, all states allow teachers to appeal the school board's decisions to some entity—a state court, a tenure commission, the state board of education, etc. *See* Education Commission of the States, *supra*. Many states allow teachers to appeal to the state supreme court, meaning the case could be reviewed four or five times. *See id.*

[7] Approximately two of three states have enacted collective bargaining statutes covering teachers and mandating that local school boards bargain with unions over the terms and conditions of employment. Collective bargaining agreements

employment except under extreme and narrow circumstances, which make discipline and termination difficult. Usually, public school teachers are summarily dismissed only in the most egregious cases. More often, problematic employees go through some form of progressive discipline before being terminated. Under the Ninth Circuit's ruling, a perceptive teacher who determines discipline or termination might be imminent could try to save his or her job by speaking about matters of public concern before an adverse employment action was taken and point to that speech as the reason for termination.

Even without the overly broad interpretation of public concern espoused by the Ninth Circuit, the problem of disgruntled teachers interjecting First Amendment issues into what are primarily personal disputes already occurs all too often. For example, Brian Vukadinovich, a public school teacher, has over the last 20 years made what are essentially personal disputes with his employers into First Amendment claims.[8] This has wasted a tremendous

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often establish rights and procedures applicable to disciplining and terminating teachers, which usually exceed the rights set forth in state statutes. *See* Education Commission of the States, State Collective Bargaining Policies for Teachers (June 2002), *available at* http://www.ecs.org/clearinghouse/37/48/3748.htm. Typically, these rights include discipline and dismissal for just cause only, which generally involves progressive discipline, due process requirements prior to and during the disciplinary process, and extensive grievance and arbitration procedures that supplement or displace statutory hearing procedures.

[8] *See Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir. 1988) (finding Mr. Vukadinovich's statements in the newspaper "attempting to articulate his private dissatisfaction with his termination [from a basketball coaching position] and the

amount of resources in various district courts, the Seventh Circuit, and indeed in this Court as well. The Ninth Circuit's analysis would simply exacerbate this problem and force courts to intervene in the operation of our nation's schools unnecessarily.

Determining whether an employee was speaking as a citizen or as an employee when speaking about matters of public concern will help courts and employers distinguish between employees who merit First Amendment protection (*i.e.*, those who are genuinely trying to inform the public about an important matter) and those who do not (*i.e.*, those who are trying to hide their inadequate work performance behind the cloak of the First Amendment). Without this determination, school districts and other public employers will be more reticent to take justified adverse action against a

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reasons given for it" was not a matter of public concern); *Vukadinovich v. Michigan City Area Sch.*, 978 F.2d 403 (7th Cir.), *cert. denied*, 510 U.S. 844 (1993) (finding that even if Mr. Vukadinovich's criticism of the school board for hiring a particular superintendent were constitutionally protected speech, his speech was not a factor at all in his termination; also finding that Mr. Vukadinovich could be ordered to stay away from school after he was terminated and had no First Amendment right to speak on matters of public concern at the school); *Vukadinovich v. North Newton Sch. Corp.*, 278 F.3d 693 (7th Cir.), *cert. denied*, 537 U.S. 876 (2002) (finding that even if Mr. Vukadinovich's accusations against the superintendent and school board were constitutionally protected, he could not prove that the school board's alleged reasons for terminating him, insubordination and neglect of duty, were pretextual when he was asked five times to comply with a directive, and refused to comply three times and only made half-hearted attempts to comply two times).

public employee for fear the employee may allege a First Amendment claim based on any of a number of statements the employee has made about matters of public concern. Employers who take their chances and discipline or terminate public employees may often be subjected to expensive settlements or costly and meritless litigation.

The Ninth Circuit's ruling only ensures that this result will occur more frequently by allowing every statement by a public employee about a matter of public concern to pass the first part of the *Pickering* analysis, thereby raising a cognizable First Amendment claim. Thus, every action taken by a school district against an employee could become a constitutional question. Determining whether the employee speech was made as an employee or as a citizen is a sufficient criterion for determining what statements should pass the first part of the *Pickering* analysis. Even if the cases described above would ultimately fail because either the employee could not prove the speech was a substantially motivating factor in the adverse employment action or the employer proves it would have reached the same decision anyway despite the speech, substantial amounts of time and money will be unnecessarily expended to resolve a claim which should not be protected as a matter of law at the outset.

CONCLUSION

The Ninth Circuit's decision erroneously ignores whether an employee is acting as a citizen when he or she speaks about a matter of public concern at work and looks only to the "content" of the speech with no consideration of the "context" and "form" of the expression. These latter factors are crucial to determining whether an individual is speaking as a public employee whose expression may be regulated by his employer without violating the First Amendment, or as a citizen whose speech may merit First Amendment protection under a *Pickering/Connick* analysis. These distinctions are especially important for public employers, such as public schools, whose very purpose and mission depend on their ability to control their employees' speech. For these reasons, *amicus* NSBA urges this Court to reverse.

Respectfully submitted,

NAOMI GITTINS*
JULIE UNDERWOOD
LISA SORONEN
Nat'l School Boards Assoc.
1680 Duke Street
Alexandria, Virginia 22314
703-838-6722
**Counsel of Record*

THOMAS E. WHEELER, II
Locke Reynolds, LLP
201 N. Illinois St., Suite 1000
Indianapolis, Indiana 46204
317-237-3800

(7)

No. 04-473

In the Supreme Court of the United States

GIL GARCETTI, ET AL., PETITIONERS

v.

RICHARD CEBALLOS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DAN HIMMELFARB
Assistant to the Solicitor General

WILLIAM KANTER
MICHAEL E. ROBINSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

MARK A. ROBBINS
General Counsel

KATHIE ANN WHIPPLE
Deputy General Counsel

STEVEN E. ABOW
Assistant General Counsel

ROBIN M. RICHARDSON
Attorney
Office of Personnel Management
Washington, D.C. 20415

QUESTION PRESENTED

Whether the First Amendment protects speech by a public employee that touches on a matter of public concern but is expressed strictly pursuant to the duties of employment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether the First Amendment protects speech by a public employee expressed pursuant to the duties of employment. Because it is the nation's largest public employer, the United States has a substantial interest in the outcome of the case.

STATEMENT

1. Respondent is a deputy district attorney in the Los Angeles County District Attorney's Office. In the late 1990s, he became calendar deputy in the Office's Pomona branch, with supervisory responsibility over two to three other deputies. In February 2000, defense counsel in *People* v. *Cuskey*, a case being prosecuted by one of respondent's supervisees, told respondent that a deputy sheriff may have lied in an affidavit used to obtain a search warrant in the case. Respondent conducted an investigation and concluded that the deputy sheriff had, at the very least, grossly misrepresented the facts. Pet. App. 2-3, 53.

Respondent discussed his investigation with petitioner Carol Najera, who was respondent's immediate supervisor, and petitioner Frank Sundstedt, who was then Head Deputy District Attorney. Najera and Sundstedt agreed that there was reason to question whether the deputy sheriff had been truthful. On March 2, 2000, respondent sent Sundstedt a memorandum that summarized his investigation and recommended that the case be dismissed. Respondent also informed defense counsel of his determination that the affidavit contained false statements.[1] On March 9, 2000, respondent, Najera, and Sundstedt met with representatives from the Sheriff's Department. As a result of the meeting, Sundstedt was not certain that *Cuskey* should be dismissed, and he decided to await the outcome of a defense motion challenging the search warrant on the ground that there were false statements in the supporting affidavit. Pet. App. 3-4 & n.1, 53-54, 61.[2]

The defense served respondent with a subpoena, and he testified at the hearing on the motion challenging the warrant. The trial court ultimately denied the motion. Pet. App. 4, 54-55.

2. Pursuant to 42 U.S.C. 1983, respondent filed suit in the United States District Court for the Central District of California against Najera, Sundstedt, petitioner Gil Garcetti, who was then District Attorney, and the County of Los Angeles. Respondent alleged that petitioners had retaliated against him for preparing the memorandum about the *Cuskey* case, and had thereby violated his First Amendment

[1] Respondent later told Najera that he had an obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to turn over his memorandum concerning the investigation, but it does not appear that he did in fact provide it to the defense. Pet. App. 4, 61 & n.3.

[2] While the court of appeals' opinion suggests that respondent made the disclosure to the defense *after* the meeting with the Sheriff's Department, Pet. App. 3-4, it appears that the disclosure was made before the meeting, see J.A. 54.

rights. The alleged acts of retaliation included demoting respondent from his position as calendar deputy, refusing to assign him murder cases, denying him a promotion, and transferring him to a different branch of the Office. Respondent also asserted a state-law claim of intentional infliction of emotional distress. Pet. App. 1, 4-6, 52, 55-56.

Concluding that they were entitled to qualified immunity, the district court granted petitioners' motion for summary judgment on respondent's Section 1983 claim. The court held that the memorandum was not protected by the First Amendment, because its preparation and submission were part of respondent's duties as a prosecutor. In the alternative, the court held that, even if the memorandum was constitutionally protected speech, the law on that point was not clearly established. Having granted petitioners' motion for summary judgment on the federal claim, the district court declined to exercise jurisdiction over the state claim. Pet. App. 52-67.[3]

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 1-51.

a. In an opinion by Judge Reinhardt, the court of appeals held that "[respondent's] allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment." Pet. App. 7. The court reached that conclusion by applying the "two-step test" (*ibid.*) derived from this Court's decisions in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and *Connick* v. *Myers*, 461 U.S. 138 (1983). As the court of appeals understood the test, a public employee's speech is protected by the First Amendment if (1) the speech "addresses a matter of public concern" and (2) the employee's interest in expressing himself outweighs the em-

[3] The district court also granted, on grounds of Eleventh Amendment immunity, the defendants' separate motion for summary adjudication of respondent's claims against Los Angeles County and Garcetti in his official capacity. Pet. App. 2.

ployer's interest in promoting efficiency and avoiding disruption in the workplace. Pet. App. 8.

In holding that respondent's speech satisfied the first part of the test, the court of appeals reasoned that "allegations that an arresting deputy sheriff may have lied in a search warrant affidavit" constitutes "whistleblowing," and speech about "corruption, wrongdoing, misconduct, wastefulness, or inefficiency" by government employees "inherently" addresses a matter of public concern. Pet. App. 10. The court rejected petitioners' contention that respondent cannot satisfy the first part of the *Pickering-Connick* test because his allegations of perjury were set forth in "a memorandum to his supervisors that he prepared in fulfillment of an employment responsibility." *Ibid.* The court believed that such a conclusion was foreclosed by the Ninth Circuit's decision in *Roth* v. *Veteran's Administration*, 856 F.2d 1401 (1988), which upheld the First Amendment claim of a plaintiff who had been fired from his government job after "expos[ing] corruption, mismanagement, and other problems in written reports that were prepared as part of his job responsibilities." Pet. App. 11. The court went on to say that petitioners' contention was in any event incorrect. A rule that public employees are not protected by the First Amendment "when their speech is uttered in the course of carrying out their employment obligations," the court said, would "undermine our ability to maintain the integrity of our governmental operations," because public employees' "access to information" and "experience regarding the operations, conduct, and policies of government agencies and officials" render them uniquely qualified to comment on matters of public concern. *Id.* at 12-13.

In holding that respondent's interest in expressing himself was not outweighed by his employer's interest in promoting efficiency and avoiding disruption in the workplace, the court of appeals found it "difficult to imagine" how "the

performance of one's duties" in "investigating allegations of law enforcement misconduct" could be "disruptive or inefficient." Pet. App. 22. In any event, the court said, petitioners "have failed even to suggest" how respondent's memorandum to a supervisor resulted in "disruption or inefficiency in the workings of the District Attorney's Office." *Ibid.* Under the second part of the *Pickering-Connick* test, the court thus found "little for [it] to weigh in favor of [petitioners]." *Ibid.*

The court of appeals went on to hold that it was clearly established that respondent's speech was protected by the First Amendment. Pet. App. 23-25. As to the first part of the *Pickering-Connick* test, the court reasoned that, as early as 1988, the Ninth Circuit had already held (in *Roth*) that a public employee has a First Amendment interest in "speech made pursuant to an employment duty." *Id.* at 24. As to the second part of the test, the court reasoned that "the law is clearly established" whenever, as in this case, "the balancing factors weigh heavily in favor of the employee." *Ibid.* The court of appeals also rejected petitioners' contention that the undisputed evidence shows that all the employment decisions of which respondent complains were taken for "nonretaliatory reasons." *Id.* at 25.[4] Those issues, the court held, are questions of fact for trial. *Ibid.* Having determined that petitioners were not entitled to qualified immunity on respondent's First Amendment claim, the court of appeals also

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[4] Petitioners had argued (Pet. C.A. Br. 7-12) that respondent was demoted from his position as calendar deputy because of a restructuring of the Pomona criminal-court system; that he was not assigned murder cases because there were few such cases and petitioners wanted other prosecutors to have the experience of handling them; that the decision to deny respondent a promotion was made by a person (Garcetti) who had no knowledge of the *Cuskey* matter; and that respondent's transfer was made pursuant to a rotation scheme that had been put into place before *Cuskey*.

reversed the district court's dismissal of respondent's state claim. *Id.* at 32.[5]

b. Judge O'Scannlain specially concurred. Pet. App. 32-51. He agreed that the Ninth Circuit's decision in *Roth* "controls the result" in this case, but believed that *Roth* "was wrongly decided" and "ought to be overruled." *Id.* at 32-33. The concurrence observed that this Court in *Connick* "took pains to recognize that '[t]he repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental.'" *Id.* at 35 (quoting *Connick*, 461 U.S. at 143, 147). In Judge O'Scannlain's view, the Ninth Circuit's decision in *Roth* "minimized—indeed, it entirely ignored—the significance of *Connick*'s distinction" between "speech offered by [a] public employee acting *as an employee* in carrying out his or her ordinary employment duties" and "speech spoken by an employee *acting as a citizen* expressing his or her personal views on disputed matters of public import." *Id.* at 36.

The concurrence found "a strong First Amendment basis for [*Connick*'s] having drawn such a distinction." Pet. App. 40. First, Judge O'Scannlain argued that public employees have no personal interest in speech expressed in the course of routine employment obligations, and that such speech in fact belongs to the State, *id.* at 41, which "has no First Amendment rights," *id.* at 43. Second, since "everything a public employee does in the course of carrying out the requirements of his or her job ultimately is connected to the public interest," Judge O'Scannlain believed that the extension of First Amendment protection to routine job duties has "'plant[ed] the seed of a constitutional case' in every task that every public employee ever performs." *Ibid.* (quoting *Connick*, 461 U.S. at 149). Third, since this Court's decisions

[5] The court of appeals also reversed the district court's dismissal, on Eleventh Amendment grounds, of respondent's claims against Los Angeles County and Garcetti in his official capacity. Pet. App. 26-32.

make clear that the government may exercise control over the speech it subsidizes through its funding decisions, Judge O'Scannlain found "no plausible basis" for concluding that the government may not exercise control over employee speech expressed in performing routine job duties. *Id.* at 46.

In the view of the concurrence, *Connick* teaches that, although speech by public employees "must address an issue of public import" to be protected under the first part of the *Pickering-Connick* test, "satisfaction of such a virtually necessary condition is not by itself sufficient to trigger constitutional constraints on governmental action." Pet. App. 49-50. Instead, Judge O'Scannlain argued, a public employee's speech satisfies the first part of the test "only when it also results from the employee's decision to express his or her *personal* opinions"—*i.e.*, opinions that are held "*as a citizen* and not as a public employee." *Id.* at 50.

SUMMARY OF ARGUMENT

A public employer obviously cannot violate the First Amendment by dismissing, transferring, demoting, or refusing to promote an employee based on the performance of job duties that do not involve speech. There is no basis for a different result in the vast number of cases where the employee performs the duties in question by speaking or writing. An employment action in either type of case might be unwarranted, or even illegal, but the First Amendment has nothing to say about actions based on the public employee's performance of his duties.

A. Until the middle of the twentieth century, this Court's view was that a citizen had a right to free speech but not to a government job. As it was then interpreted, the First Amendment did not prevent public employers from taking employment actions on the basis of an employee's speech, even if the speech was expressed outside the office and had no connection with the employee's job. The Court changed course in a series of cases involving requirements that public

employees take a general oath of loyalty and reveal their private associations. Those decisions upheld the right of public employees to participate in public affairs along with other citizens.

Pickering v. *Board of Education*, 391 U.S. 563 (1968), followed from that understanding of the First Amendment. It held that, in deciding whether an employment action in response to a public employee's speech violates the First Amendment, a court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern" and "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. Applying that test, the Court concluded that the First Amendment prohibited the dismissal of a public-school teacher for writing a letter to a newspaper that criticized school-board policies, because, in the circumstances of the case, the teacher was little different than a "member of the general public." *Id.* at 573, 574. In *Connick* v. *Myers*, 461 U.S. 138 (1983), which *rejected* a public employee's First Amendment claim, the Court emphasized that its responsibility is to ensure that "citizens are not deprived of fundamental rights by virtue of working for the government," and made clear that no balancing of interests is required when the employee is not speaking "as a citizen upon matters of public concern." *Id.* at 147.

B. The Ninth Circuit erred in holding that, under the first part of the *Pickering-Connick* test, a public employee has a First Amendment interest in any speech on a matter of public concern, even if it is expressed in carrying out his job duties. First, the holding is inconsistent with this Court's articulation of the applicable standard in *Pickering*, *Connick*, and other cases. Under that standard, the interest that is balanced against the interest of the employer is the interest of the employee, "*as a citizen*, in commenting upon matters of public concern." *Pickering*, 391 U.S. at 568 (emphasis

added). Second, the Ninth Circuit's decision is analytically flawed. Constitutional rights are personal, and when a public employee speaks in carrying out his job duties, he has no personal interest in the speech. Third, the court of appeals' decision has practical consequences that this Court could not have intended when it recognized that speech by public employees has limited First Amendment protection. Since virtually everything a public employee does in carrying out his job duties is ultimately connected to the public interest, and much of that activity involves speaking or writing, the decision below plants "the seed of a constitutional case," *Connick*, 461 U.S. at 149, in a very large proportion of the tasks that a public employee performs. Fourth, the Ninth Circuit's decision disregards the "historical evolvement" of the First Amendment rights of public employees. *Id.* at 143. While this Court has abandoned the view that a State may place unlimited conditions on the terms of public employment unrelated to the employment, it has not moved to the opposite extreme of constitutionalizing all aspects of public employment. The Court's decisions seek only to ensure that public employees have the same rights as their private-sector counterparts. Finally, contrary to the contentions of respondent and the court of appeals, a holding that public employees have no First Amendment interest in speech expressed pursuant to job responsibilities will not impair their ability or willingness to expose governmental misconduct.

C. If the Court holds that a public employee does have a First Amendment interest in speech expressed in carrying out his job duties, the Court should make clear that it will ordinarily be easier to justify an employment action when the speech is of that type. Because the second part of the *Pickering-Connick* test focuses on the effective functioning of an employer's enterprise, the employer should be able to defeat an employee's First Amendment claim if it can show that, in saying or writing the things at issue, the employee

was performing his duties in an inadequate or inappropriate manner.

ARGUMENT

A PUBLIC EMPLOYEE HAS NO FIRST AMENDMENT INTEREST IN SPEECH EXPRESSED IN PERFORMING HIS JOB DUTIES

When a public employee files an action alleging that his First Amendment rights were violated because an adverse employment action was taken against him in retaliation for his speech, this Court's decisions require a two-step inquiry. A court first determines whether the plaintiff's speech was expressed "as a citizen" on a "matter[] of public concern." *Connick* v. *Myers*, 461 U.S. 138, 140 (1983) (quoting *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968)). If it was not, the First Amendment claim fails. If it was, the defendant must show that the employee's interest in the speech is outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.* (quoting *Pickering*, 391 U.S. at 568).[6] The speech at issue in this case was expressed by respondent as an employee in performing his job responsibilities, not as a citizen in commenting on matters of public concern. Respondent therefore has no First Amendment interest in his speech. If the Court concludes otherwise, however, it should make clear that it will generally be easier for an employer to justify an employment action when the employee's speech was expressed in the course of carrying out his job duties.

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[6] Whether a public employee has a presumptively protected interest in his speech and, if so, whether it is outweighed by the interest of his employer are both questions of law. *Waters* v. *Churchill*, 511 U.S. 661, 668 (1994) (plurality opinion); *Rankin* v. *McPherson*, 483 U.S. 378, 386 n.9 (1987).

A. Under *Pickering* And *Connick*, A Court Must Determine Whether The Employee's Speech Was Expressed As A Citizen On A Matter Of Public Concern And, If It Was, Must Balance The Employee's Interest In The Speech Against The Employer's Interest In The Efficient Performance Of Public Services

1. As interpreted for most of the nation's history, the First Amendment placed no limitation on a public employer's ability to make personnel decisions on the basis of an employee's speech. The First Amendment was thought to apply when the government acted as sovereign with respect to citizens, but not when it acted as employer with respect to employees. In the latter capacity, the government was treated like any other employer. As Justice Holmes famously put it, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

For a long time, "Holmes' epigram expressed this Court's law." *Connick*, 461 U.S. at 144. See *ibid.* (citing decisions from first half of twentieth century). Indeed, as recently as 1952, in *Adler* v. *Board of Education*, 342 U.S. 485, the Court relied on the principle that public-school teachers "have the right under our law to assemble, speak, think and believe as they will," but "have no right to work for the State in the school system on their own terms." *Id.* at 492. The Court modified its view, however, in "a series of cases arising from the widespread efforts in the 1950's and early 1960's to require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated." *Connick*, 461 U.S. at 144. See *ibid.* (citing cases). Thus, fifteen years after *Adler*, the Court explained that "constitutional doctrine which has emerged since that decision has rejected its major premise," which was that "public employment, including academic employment, may

be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605 (1967).

In the loyalty-oath cases, the Court invalidated statutes and actions that conditioned public employment on general oaths of loyalty and the disclosure of private associations. Those decisions thus preserved public employees' right "to participate in public affairs." *Connick*, 461 U.S. at 144-145. The Court's decision in *Pickering*, *supra*, "followed from this understanding of the First Amendment." *Id.* at 145.

2. The plaintiff in *Pickering* was a public-school teacher who was fired for writing a letter to a newspaper that criticized the way the school board had attempted to raise revenue. In upholding the teacher's First Amendment claim, this Court said that, insofar as the lower court had concluded that public-school teachers "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools," the decision rested on a premise that had been rejected by the Court. *Pickering*, 391 U.S. at 568. At the same time, the Court recognized that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Ibid.* To resolve a First Amendment claim in a case of this type, the Court said, it is thus necessary to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern" and "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.*

In striking the balance in the plaintiff's favor in *Pickering*, the Court described the case before it as one in which a teacher made "public statements upon issues then currently

the subject of public attention" that were "critical of his ultimate employer" but did not "impede[] the teacher's proper performance of his daily duties in the classroom" or "interfere[] with the regular operation of the schools generally." 391 U.S. at 572-573. Under these circumstances, the Court concluded, "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573. Making a similar point later in its opinion, the Court said that, "in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher," the employee must be regarded as "the member of the general public he seeks to be." *Id.* at 574.[7]

3. Fifteen years after *Pickering*, in *Connick*, *supra*, this Court "return[ed] to th[e] problem" of striking a balance between the interests of a public employee and those of a public employer. *Connick*, 461 U.S. at 140. In rejecting the First Amendment claim in *Connick*, the Court explained that "[t]he repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental." *Id.* at 143. That language, the Court said, "reflects both the historical evolvement of the rights of public employees, and the commonsense realization that government offices could not function if every employment decision became a constitutional matter." *Ibid.* Thus, when a public employee is not speaking "as a citizen upon matters of public concern," his First Amendment claim should be rejected without any balancing of the

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[7] Likewise, in his separate opinion, Justice White observed that the holding of the Court was that, "in this case, with respect to the particular public comment made by [the teacher]," the First Amendment required that he be treated "like a member of the general public." 391 U.S. at 582 n.1 (opinion concurring in part and dissenting in part).

interests of the employee and the employer. *Id.* at 147. This Court's responsibility, *Connick* makes clear, is merely to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Ibid.*

The plaintiff in *Connick* was an assistant district attorney who was told she would be transferred and then circulated a questionnaire soliciting the views of her colleagues on office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. She was fired as a result. The Court held that, with one exception, the questions in the questionnaire were "mere extensions" of the plaintiff's "dispute over her transfer," and thus did not "fall under the rubric of matters of 'public concern.'" 461 U.S. at 148. Presuming that "all matters which transpire within a government office are of public concern," the Court observed, would mean that "virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Id.* at 149. Because the questions did not address a matter of public concern, the Court found it "unnecessary * * * to scrutinize the reasons for [the plaintiff's] discharge." *Id.* at 146. The one question that did touch on a matter of public concern, in the Court's view, was whether assistant district attorneys ever felt pressured to work in political campaigns. The Court thus went on to balance the employee's interest in commenting on that matter against her employer's interest in workplace efficiency. Striking the balance in favor of the employer, the Court deferred to the district attorney's judgment that the questionnaire was "an act of insubordination which interfered with working relationships." *Id.* at 151.

B. Respondent Does Not Have A First Amendment Interest In His Speech, Because It Was Expressed In Carrying Out The Duties Of His Job

Respondent alleges that petitioners retaliated against him because of his memorandum concerning the *Cuskey* case. Pet. App. 61. That memorandum, which he sent to Sundstedt, described respondent's investigation, expressed his belief that the deputy sheriff's search-warrant affidavit had been falsified, and recommended that the case be dismissed. *Ibid.* Respondent acknowledges, as he must, that the memorandum was prepared pursuant to his employment duties. *Id.* at 64. As the district court observed, when respondent "looked into the defense lawyer's allegations" and "urged that the prosecution be dropped," he was "complying with his (and the government's) duties under the due process clause of the Fifth and Fourteenth Amendments," as interpreted by this Court in *Brady* v. *Maryland*, 373 U.S. 83 (1963), "not to introduce or rely on evidence known to be false." Pet. App. 64. The memorandum recommending dismissal, moreover, was a "disposition" report, *ibid.*; Br. in Opp. 3, a document that is "common[ly]" prepared by prosecutors in the Los Angeles County District Attorney's Office, Pet. App. 64. Indeed, respondent testified at his deposition that disposition reports are prepared in "any cases we've ever handled." J.A. 41.

As the concurrence below recognized (Pet. App. 42 n.3), and as respondent himself acknowledges (Br. in Opp. 1-2), the preparation of the disposition memorandum and its submission to respondent's supervisors were part of a broader course of conduct relating to the *Cuskey* prosecution. The conduct began with respondent's investigation of defense counsel's allegations and ended with his testimony at the hearing on the motion challenging the search warrant, and it included his disclosure to the defense of his conclusion that the supporting affidavit had been falsified. That disclosure,

like the memorandum, was speech expressed by respondent in carrying out his prosecutorial duties.

The Ninth Circuit did not dispute that respondent was carrying out the requirements of his job when he wrote the disposition memorandum and made the disclosure to the defense. On the contrary, the court acknowledged that respondent had a duty to do those things. Pet. App. 20, 22. The basis for the court's holding was that, for purposes of the first part of the *Pickering-Connick* test, that fact is irrelevant. The result would be the same whether respondent was addressing a matter of public concern independent of his job duties or looking into a matter of public concern as an integral part of his job. In the court of appeals' view, a public employee has a First Amendment interest in any speech that touches on a matter of public concern, whether or not it is expressed in the performance of his duties.

That view is incorrect. If petitioners took the challenged actions because of speech expressed by respondent in the exercise of his duties, they may have acted improperly, or even illegally, but they did not violate the First Amendment.

1. *The Ninth Circuit's decision is inconsistent with this Court's articulation of the applicable standard*

In *Pickering*, the Court did not describe the interest of the public employee that is balanced against the interest of his employer merely as an interest in commenting on matters of public concern. The Court described it as the interest of the employee, "*as a citizen*, in commenting upon matters of public concern." 391 U.S. at 568 (emphasis added). The Court used the same formulation in *Connick*, no fewer than four times, see 461 U.S. at 140, 142, 143, 147, including when it said that balancing is not required if the public employee was not speaking "as a citizen upon matters of public concern," *id.* at 147. The Court has also used the *Pickering* formulation in several post-*Connick* cases.[8] In one of them, *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995), the Court struck down a law prohibiting federal employees from accepting compensation for speeches and articles, and relied, in part, on the fact that the law regulated speech by employees "in their capacity as citizens, not as Government employees." *Id.* at 465. See also *id.* at 466 (italicizing phrases "as a citizen" and "as an employee" in discussing first part of *Pickering-Connick* test) (quoting *Connick*, 461 U.S. at 147); *id.* at 482 (O'Connor, J., concurring in the judgment in part) (emphasizing impact of ban on "employees' interests in speaking out as citizens, rather than as employees").

As Judge O'Scannlain explained in his concurrence below, the fact that "speech uttered by public employees * * * address[es] an issue of public import" is therefore necessary but not sufficient for the speech to fall within the scope of the First Amendment, such that a balancing of interests is required. Pet. App. 49. The speech must also be uttered by the speaker "*as a citizen* and not as a public employee." *Id.* at 50. Judge Luttig has likewise explained that, under *Pickering* and *Connick*, "the citizen/employee distinction" is "equally" as "importan[t]" as "the public concern/personal interest distinction." *Urofsky* v. *Gilmore*, 216 F.3d 401, 420 (4th Cir. 2000) (en banc) (concurring opinion), cert. denied, 531 U.S. 1070 (2001). Thus, while most of the assistant district attorney's speech in *Connick* was held not to satisfy the first part of the *Pickering-Connick* test because it addressed a matter of "personal interest" rather than public concern, 461 U.S. at 147, even speech that does address a matter of

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[8] See *Rankin* v. *McPherson*, 483 U.S. at 384; *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 99 (1990); *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 465-466 (1995); *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 676 (1996); *City of San Diego* v. *Roe*, 125 S. Ct. 521, 525 (2004) (per curiam).

public concern does not satisfy the first part of the test if it is not "citizen" speech. If the assistant district attorney had addressed improper political pressure on career attorneys as part of a public-integrity prosecution, the matter would equally have been of public concern, but she would not have had a First Amendment claim, because the speech would not have been expressed as a citizen. If the law were otherwise, it would be hard to explain why, in formulating the standard, the Court included the limiting phrase "as a citizen."

It is true, as respondent points out, that this Court has extended First Amendment protection to speech addressing a matter of public concern when the speech was both "related to the public employee's job and communicated in the workplace." Br. in Opp. 8. But none of the Court's decisions applying the principle established in *Pickering* and *Connick* has extended First Amendment protection to speech expressed in carrying out the public employee's job responsibilities. All involve "citizen" speech—whether related or unrelated to the employee's job, and whether communicated in or out of the workplace.[9] This Court has thus never held —or even assumed—that speech of the type at issue here may give rise to a First Amendment action.

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[9] See *Pickering*, *supra* (school teacher wrote letter to editor criticizing Board of Education); *Perry* v. *Sindermann*, 408 U.S. 593 (1972) (college professor publicly criticized Board of Regents); *Mt. Healthy City Sch. Dist.* v. *Doyle*, 429 U.S. 274 (1977) (school teacher informed radio station of substance of memorandum circulated by principal); *Givhan* v. *Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (school teacher complained to principal about policies teacher considered racially discriminatory); *Connick*, *supra* (assistant district attorney circulated questionnaire to colleagues concerning job satisfaction and related issues); *Rankin* v. *McPherson*, *supra* (clerk in constable's office told colleague, after President Reagan was shot, that she hoped any subsequent attempt on his life would be successful); *Waters* v. *Churchill*, *supra* (nurse made statements to colleague critical of hospital).

2. *The Ninth Circuit's decision is analytically flawed*

To hold that a public employee has a right under the First Amendment (or at least a presumptive one) to say what he wishes in performing the written and spoken aspects of his job, so long as the speech addresses a matter of public concern, is tantamount to holding that he has, at least in some circumstances, a federal constitutional right to perform his job as he sees fit. No employee, public or otherwise, has a right to do that. This Court's statements that the First Amendment covers speech by a public employee "as a citizen" are thus "not accidental." *Connick*, 461 U.S. at 143.

"[C]onstitutional rights are personal," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973), and "[t]he purpose of the First Amendment is to protect private expression," *Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) (quoting Thomas I. Emerson, *The System of Freedom of Expression* 700 (1970)). As the concurrence below pointed out, "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech," Pet. App. 41, and their speech is not *private* expression. Instead, the public employees are speaking (or writing) because their job requires it, and their speech, "in actuality," is "the State's." *Ibid.* Unlike citizens, however, a State "has no First Amendment rights," *id.* at 43; accord *Gonzalez* v. *City of Chicago*, 239 F.3d 939, 941 (7th Cir. 2001), and nothing in the First Amendment "precludes the government from controlling its own expression or that of its agents," *Columbia Broad. Sys.*, 412 U.S. at 139 n.7 (Stewart, J., concurring) (quoting Emerson, *supra*, at 700).

In this respect, the Ninth Circuit's decision cannot be reconciled with the principle that governs the analogous issue of restrictions on government-funded speech. In *Rust* v. *Sulli-*

van, 500 U.S. 173 (1991), this Court rejected a First Amendment challenge to regulations prohibiting abortion-related advice by the staff of clinics that accepted federal funds. The Court reasoned that the only speech limited by the regulations was that of individuals in their capacity as employees of a federally funded entity; the regulations did not "in any way restrict the activities of those persons acting as private individuals." *Id.* at 198-199. In *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), the Court explained that, under the holding of *Rust*, "[w]hen the government appropriates public funds to promote a particular policy of its own," it "is entitled to say what it wishes" and "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.* at 833. In *Legal Services Corp.* v. *Velasquez*, 531 U.S. 533 (2001), the Court held that a restriction on speech by a legal-services lawyer did violate the First Amendment even though the lawyer worked for a publicly funded entity, because, unlike in *Rust*, the employee was "not the government's speaker," but instead was engaged in "private speech" on behalf of an indigent client. *Id.* at 542.

The reasoning of these cases is equally applicable here. As the en banc Fourth Circuit has recognized, "[i]n both situations—public employee speech and government-funded speech—the government is entitled to control the content of the speech" because it is the government's message that is being conveyed and the government has in effect "'purchased' the speech * * * through a grant of funding or payment of a salary." *Urofsky* v. *Gilmore*, 216 F.3d at 408 n.6. Similarly, in both situations, there is a *limit* on the government's ability to control speech: "Just as the government as provider of funds cannot dictate the content of speech made outside the confines of the funded program, the government as employer is restricted in its ability to regulate

the speech of its employees when they speak not as public employees, but as private citizens on matters of public concern." *Ibid.* (citation omitted).[10]

3. *The Ninth Circuit's decision has practical consequences that this Court could not have intended when it recognized that speech by public employees has limited First Amendment protection*

As Judge O'Scannlain observed, virtually "everything a public employee does in the course of carrying out the requirements of his or her job ultimately is connected to the public interest." Pet. App. 43. Under the court of appeals' view, therefore, "the seed of a constitutional case," *Connick*, 461 U.S. at 149, is planted in nearly "every task that every public employee ever performs," Pet. App. 43. Accord *Urofsky*, 216 F.3d at 408 ("It is difficult to imagine the array of routine employment decisions that would be presented as

---

[10] In support of its assertion that the First Amendment's protections "do not turn upon whether a citizen has a personal interest in a particular expressive activity," the court of appeals pointed out that, "under *Connick*, personnel grievances, which are often highly personal, do not receive protection at all." Pet. App. 13 n.5. This confuses the two components of the first part of the *Pickering-Connick* test. Under that test, there is no presumptive First Amendment protection for a public employee's speech unless it is speech as a citizen *and* on a matter of public concern. *Connick* involved the second component, not the first. The speech was held to be unprotected because, *even though* the plaintiff was speaking in her capacity as a citizen rather than an employee (*i.e.*, even though the plaintiff had a personal interest in the speech), the speech did not address a matter of public concern.

For his part, respondent contends that the disposition memorandum *did* express his "personal views," because his supervisors could "take or leave" his recommendation. Br. in Opp. 10 n.3. That is not correct. The memorandum expressed respondent's views as a prosecutor, not a citizen. The fact that respondent did not make a conclusive determination but merely recommended a course of action, and that his recommendation might ultimately be rejected by the Office's final decisionmaker, does not convert the memorandum into an expression of respondent's "personal" views.

constitutional questions * * * under this view of the law."). Requiring a case-specific balancing of the interests of the employee and the employer whenever an adverse employment decision can be connected to speech by the employee in the exercise of his duties is inconsistent with "the commonsense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143. Deciding whether the written and spoken aspects of a public employee's job have been performed in a way that disrupts the workplace is also a task for which federal judges are ill-suited. And the Ninth Circuit's decision has two additional consequences: it undermines the democratic process, by hindering the ability of politically accountable officials to run their agencies, and, as applied to federal employees, it encroaches on the authority of the Executive Branch.

Suppose, for example, that a district attorney directed one of his assistants to "make[] a formal statement to the press regarding an upcoming murder trial," the assistant "challenge[d] his employer's instructions regarding the content of the statement," and the assistant was demoted as a result. *Urofsky*, 216 F.3d at 407-408. Or suppose that petitioners were represented in this case, not by private counsel, but by a lawyer employed by the County of Los Angeles; the lawyer determined that respondent had "a viable First Amendment retaliation claim" and, contrary to the instructions of his superiors, filed a brief in the court of appeals "agreeing with the claims made by [respondent's] counsel" and "providing additional arguments to support them"; and the government lawyer was fired as a result. Pet. App. 44 (concurring opinion). Under the Ninth Circuit's view, the speech of the public employee in each instance would be presumptively entitled to constitutional protection, and the action by the employer would violate the First Amendment unless the employer could show that its interest in taking the action outweighed the employee's interest in his speech. That is an "absurd result." *Ibid.* And the fact that it is the result to which the court of appeals' decision leads is a strong indication that the decision is wrong.[11]

4. *The Ninth Circuit's decision ignores the historical development of the First Amendment rights of public employees*

As this Court observed in *Connick*, the "unchallenged dogma" until the middle of the twentieth century was that "a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." 461 U.S. at 143. While the Court has since abandoned that strict view, it has not moved to the opposite pole. On the contrary, the Court's decisions in this area seek only to "maintain for the government employee the same right[s] enjoyed by his privately employed counterpart," *Urofsky*, 216 F.3d at 407, because "a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters," *Waters* v. *Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion). Thus, the rationale for *Pickering*'s holding that a public-school teacher's letter to the editor was protected by the First Amendment was that the teacher was entitled to

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[11] Respondent suggests, as did the court of appeals, that speech by a public employee in the exercise of his job duties may not be protected by the First Amendment when the employee is speaking to someone outside the government, but *is* protected when he is speaking to someone *within* the government. Br. in Opp. 10 n.3; Pet. App. 14 n.6. There is no basis for such a distinction. If respondent had sent his memorandum to Najera and she had directed him to make substantive changes before sending it to Sundstedt, but respondent had sent the memorandum to Sundstedt as it was and had been disciplined for not changing it, the disciplinary action, under respondent's view, would have been presumptively unconstitutional. That result is no less absurd than the result of the hypotheticals in the text. In any event, respondent *did* communicate with a person outside the government: he informed defense counsel that he believed the search-warrant affidavit had been falsified.

the same rights as any "member of the general public." 391 U.S. at 573, 574. And *Connick* reiterated that the Court's obligation was to ensure that "citizens are not deprived of fundamental rights by virtue of working for the government." 461 U.S. at 147. The Ninth Circuit's decision disregards this "historical evolvement" of the First Amendment. *Id.* at 143. It goes well beyond ensuring that public employees are treated the same as their private-sector counterparts, and effectively accords preferential treatment by granting them at least a presumptive "First Amendment right to dictate to the state how they will do their jobs." *Urofsky*, 216 F.3d at 407.[12]

5. ***A holding that public employees have no First Amendment interest in speech expressed in performing their job duties will not impair their ability or willingness to expose governmental misconduct***

According to respondent and the court of appeals, the rule advocated by petitioners and the concurrence would curtail speech by those "in the best position to expose governmental misconduct, corruption, and inefficiency." Br. in Opp. 20; accord Pet. App. 12-13. A holding that a public employee has no First Amendment interest in speech expressed pursuant to his job responsibilities, however, will not deprive public employees of the ability to expose wrongdoing. As it does

[12] Indeed, by virtue of the combined effect of the court of appeals' approach at step one of the *Pickering-Connick* inquiry and its approach at step two, public employees whose speech is expressed in their capacity as employees are not only accorded preferential treatment vis-à-vis private-sector employees, they are accorded preferential treatment vis-à-vis public employees whose speech is expressed in their capacity as citizens. While a plaintiff like respondent will prevail at step one *despite the fact* that his speech was required by his job, he will almost always prevail at step two *precisely because* the speech was required by his job, since, in the view of the court of appeals, "[i]t is difficult to imagine how the [good-faith] performance of one's duties * * * could be disruptive or inefficient." Pet. App. 22.

for any "member of the general public," *Pickering*, 391 U.S. at 573, 574, the First Amendment protects the right of a public employee, acting in his capacity as a citizen, to "seek to bring to light actual or potential wrongdoing or breach of public trust," *Connick*, 461 U.S. at 148. Indeed, *Connick* itself found that the plaintiff's questionnaire, which obviously was not within her job responsibilities, was citizen speech on a matter of public concern insofar as it asked whether other assistant district attorneys had ever felt pressured to work in political campaigns. *Id.* at 149. As for public employees whose job it is to expose governmental misconduct, there is little reason to think that a holding that the First Amendment does not protect what they say and write in the exercise of their job duties will affect their willingness to carry out those duties. Such employees already have powerful motivations for rooting out misconduct—a desire to serve the public and a desire to retain their jobs—and there will likely be some statutory remedy (under civil-service laws, for example) for employment action taken against a public employee who has performed his duties in an appropriate manner. In light of these specific statutory protections, there is no reason to constitutionalize every aspect of the relationship between public employers and employees whose job responsibilities include the investigation of wrongdoing.

Respondent also contends that a holding that there is no First Amendment protection for a public employee's speech in the exercise of his job responsibilities would "create perverse incentives" for both employers and employees. Br. in Opp. 20. Respondent argues that the rule advocated by petitioners would create an incentive for employers to "broaden their immunity" by "adding to their employees' reporting duties" the duty to "report[] official wrongdoing." *Ibid.* And he argues (as did the court of appeals, Pet. App. 14), that the rule would create an incentive for employees to "take every accusation of wrongdoing directly to the press instead of dis-

creetly pursuing internal channels." Br. in Opp. 20. There is no merit to either argument.

As to employers: If they sought to "broaden their immunity" from First Amendment lawsuits (Br. in Opp. 20) by making the reporting of official wrongdoing a job responsibility, it is likely that public employers would simultaneously be broadening their exposure to other forms of liability (under civil-service laws, for example). Under a regime in which all public employees are required to report governmental misconduct, an employee dismissed, demoted, or otherwise disciplined for doing so could plausibly claim that the employment action was unwarranted because an employee cannot be punished simply for doing his job.

As to employees: If reporting wrongdoing forms no part of a public employee's job responsibilities and he wishes to do so in his capacity as a citizen, the First Amendment will provide no less protection if he reports the conduct internally than if he reports it to the press. As this Court held in *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979), First Amendment rights are not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Id.* at 415-416. If, on the other hand, the reporting of wrongdoing does fall within the employee's job duties, he is likely to fare worse, not better, by reporting wrongdoing to the press rather than his superiors. A public employee responsible for investigating wrongdoing is ordinarily prohibited from speaking to the press about an ongoing investigation without the permission of his employer. A prohibition of this type serves important governmental interests (for example, preventing an investigation from being compromised) and reflects settled professional norms (for example, ensuring that government attorneys maintain client confidences). If an employee responsible for investigating official wrongdoing nevertheless does speak to the press, his em-

ployer may well discipline him for violating the prohibition (without regard to the content of his speech), and any First Amendment challenge to the action will almost certainly fail under step two of the *Pickering-Connick* test (even assuming the employee can prevail at step one). An adverse employment action is much less likely if wrongdoing is reported through internal channels.

The contention that adopting petitioners' position will impair the ability or willingness of public employees to expose governmental misconduct also overlooks the fact that legislatures may "choose to give additional protections to [public] employees beyond what is mandated by the First Amendment." *Waters*, 511 U.S. at 674 (plurality opinion). Congress and the legislatures of many states have enacted whistleblower laws, see Pet. App. 46-49 (concurring opinion), and some of them do provide protection, at least in certain circumstances, for employees whose job duties obligate them to report official wrongdoing, see, *e.g.*, *Huffman* v. *OPM*, 263 F.3d 1341, 1351-1355 (Fed. Cir. 2001).[13]

---

[13] Although the court of appeals decided that petitioners were not entitled to qualified immunity on respondent's constitutional claim, the only question presented in this Court is whether petitioners violated respondent's constitutional rights. See Pet. i. To the extent that the correctness of the court of appeals' holding on qualified immunity is fairly included within that question, cf. *Procunier* v. *Navarette*, 434 U.S. 555, 560 n.6 (1978), the court of appeals erred by holding that it was clearly established at the time of the challenged conduct that public employees have a First Amendment interest in speech expressed in performing their duties (even assuming the court of appeals' constitutional holding is correct). Courts of appeals have rendered conflicting decisions on the issue, see Pet. App. 14-16 & n.7 (citing cases); *id.* at 38-39 & n.2 (concurring opinion) (same), and "[i]f judges thus disagree on a constitutional question, it is unfair to subject [petitioners] to money damages for picking the losing side of the controversy," *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). See *Hanlon* v. *Berger*, 526 U.S. 808 (1999) (per curiam) (reversing the Ninth Circuit's finding of no qualified immunity even though the Court agreed with the Ninth Circuit on the constitutional issue). The court of appeals claimed (Pet. App. 12, 24) that three decisions of the Ninth Circuit—*Roth* v. *Veteran's Administration*, 856 F.2d 1401 (1988), *Nunez* v. *Davis*, 169 F.3d

C. If A Public Employee Has A First Amendment Interest In Speech Expressed In Performing His Job Duties, It Should Generally Be Easier For The Employer To Justify An Employment Action When The Speech Is Of That Type

1. If the Court were to hold that a public employee has a First Amendment interest in speech addressing a matter of public concern even when it is expressed in carrying out his job responsibilities, the burden in a case of this type would shift to the employer to show that the employee's interest in the speech is outweighed by the employer's interest in the efficient performance of public services. An employer's burden under the second part of the *Pickering-Connick* test "varies depending upon the nature of the employee's expression," *Connick*, 461 U.S. at 150, and thus the Court should clarify that an employer's burden is relaxed when the employee's speech is expressed in the course of performing his job duties (assuming the employee has any First Amendment interest in such speech). The "state interest element" of the *Pickering-Connick* test focuses on "the effective functioning of the public employer's enterprise." *Rankin* v. *McPherson*, 483 U.S. 378, 388 (1987). If an employer can show that, in saying or writing the things at issue, the employee was performing his duties inadequately or inappropriately, that showing should be sufficient to defeat the constitutional claim, because performing one's job in such a manner directly affects the functioning of the enterprise. Any constitutionally protected interest that a public employee might have in the written and spoken aspects of his job is less substantial than the interest of the employer—and

1222 (1999), cert. denied, 528 U.S. 1115 (2000), and *Pool* v. *Vanrheen*, 297 F.3d 899 (2002)—had already resolved the issue. But while the speech in those cases may have been expressed in the performance of the public employee's duties, none addressed the question whether that fact deprived the speech of First Amendment protection.

the public it serves—in ensuring that every aspect of the employee's job is performed satisfactorily. And even the "[g]ood-faith" performance of one's job, Pet. App. 20; see note 12, *supra*, can be unsatisfactory. Accordingly, if the Court holds that a public employee has a First Amendment interest in any speech that addresses a matter of public concern, the Court should make clear that it will ordinarily be more difficult for the employee to prevail at the second step of the *Pickering-Connick* inquiry when the speech is expressed in the course of the employee's duties.

2. In the court of appeals, petitioners argued generally that, if they did not prevail at the first step of the *Pickering-Connick* inquiry, they should prevail at the second step. Pet. C.A. Br. 30-32. The court of appeals addressed (and rejected) that argument, Pet. App. 18-22, and the question whether respondent's speech is protected under part two of the *Pickering-Connick* test is fairly included within the question on which this Court granted certiorari, see Sup. Ct. R. 14.1(a).[14] Nevertheless, the current posture of this case makes a balancing of interests by this Court inadvisable.

This is not a case like *Connick*, 461 U.S. at 141, 151-154, *Rankin*, 483 U.S. at 380-382, 388-392, and *Waters*, 511 U.S. at 664-666, 680-682, where the defendants conceded that the employment actions were taken in response to the employee's speech but argued that the speech was sufficiently disruptive that any interest the employee had in the speech was outweighed by the employer's interest in workplace efficiency. Petitioners have consistently denied that the chal-

[14] The question presented is whether a public employee's speech expressed pursuant to the duties of employment is "cloaked with First Amendment protection." Pet. i. That question subsumes both parts of the test. See *Waters* v. *Churchill*, 511 U.S. at 668 (plurality opinion) (public employee's speech "is protected by the First Amendment" if employee prevails at both steps of *Pickering-Connick* inquiry). See also Pet. App. 7 (court of appeals applied "two-step test" to determine whether respondent's speech "is protected by the First Amendment").

lenged employment actions were taken as a result of respondent's speech. Instead, petitioners have explained their actions as routine employment actions not prompted by any specific conduct by respondent. See Pet. App. 25; note 4, *supra*. While taking that position might not have prevented petitioners from arguing in the alternative that their actions *would* have been justified if they *had* been taken in response to respondent's speech, petitioners apparently did not do so.

It may well be that respondent's speech in connection with the *Cuskey* prosecution had the potential to "interfere[] with the regular operation" of the District Attorney's Office, *Pickering*, 391 U.S. at 573; accord *Rankin*, 483 U.S. at 388, or "undermine management's authority," *Waters*, 511 U.S. at 680-681 (plurality opinion); accord *Connick*, 461 U.S. at 154. But petitioners have "offer[ed] no explanation" as to how respondent's speech "resulted in inefficiency or office disruption," Pet. App. 21, and they have not developed a record that would support such a theory. Accordingly, if the Court were to hold that respondent has a First Amendment interest in his speech under step one of the *Pickering-Connick* inquiry, the Court would not be in a suitable position to conduct the step-two balancing itself. The proper course in that event would be to clarify that the employer's burden is reduced in cases involving speech in the course of an employee's job duties and to vacate the judgment of the court of appeals. On remand, petitioners should then be free to supplement the record with evidence that is relevant to the balancing of interests and to argue that the undisputed facts, at a minimum, entitled them to qualified immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
DAN HIMMELFARB
Assistant to the Solicitor General
WILLIAM KANTER
MICHAEL E. ROBINSON
Attorneys

MARK A. ROBBINS
General Counsel
KATHIE ANN WHIPPLE
Deputy General Counsel
STEVEN E. ABOW
Assistant General Counsel
ROBIN M. RICHARDSON
Attorney
Office of Personnel Management

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In The
Supreme Court of the United States

GIL GARCETTI, FRANK SUNDSTEDT, CAROL NAJERA and COUNTY OF LOS ANGELES,

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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CINDY S. LEE
Counsel of Record
JIN S. CHOI
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Telephone (818) 545-1925
Facsimile (818) 545-1937
Counsel for Petitioners

BONNIE I. ROBIN-VERGEER
Counsel of Record
SCOTT L. NELSON
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
Telephone (202) 588-1000
Facsimile (202) 588-7795
Counsel for Respondent

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COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, Individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually, and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive, Defendants.	)	No. CV 00-11106 AHM (AJWx)

DEPOSITION OF RICHARD CEBALLOS, taken on behalf of the Defendants Gil Garcetti, Frank Sunstedt, Carol Najera, County of Los Angeles at 225 South Lake Avenue, Penthouse, Pasadena, California, 91101, commencing at 10:28 a.m., Tuesday, May 8, 2001, before Sheri L. Valley, CSR NO. 12077.

* * *

[6] Q. Let me go over some of the ground rules. Your attorney may have familiarized you with a little bit about this, the general nature of today's proceeding, but just so that we're clear, the court reporter seated to my right has placed you under oath. It's the same oath as you would be taking in a court of law and requires you to tell the truth,

and if you do not, that could subject you to the penalty of perjury.

Do you understand that?

A. Yes.

Q. The court reporter is also taking down everything that we say, which means that this includes words, things that she can transcribe. Things that we may understand in our everyday conversations, like uh-huh, uh-uhs, shakes of the head, pointing with the fingers, that can't be transcribed, so it's important for you to speak audibly, clearly, and with words.

A. I understand.

Q. If at any time you need me to repeat a question, or if you don't understand a question, let me know; and if you do respond to a question, I'll assume two things: Number one, that you heard my question, and number two, that you understood it.

Okay?

A. Okay.

[7] Q. It's also important that you allow the court reporter to allow me to finish my question before you answer the questior, because she can only take down one person at a time.

Okay?

A. Yes.

Q. Another thing I wanted to mention was that at some point in time, the testimony that you give today will be transcribed into a booklet form. It will be made

available to you through your counsel for review. You may review it and make any corrections or changes to it; however, I must caution that if you do make any changes to it, any particularly significant changes – what I mean by that is if you answer a question yes today and then upon your review of the transcript, you change it to a no, that could be commented upon at the time of trial or any other proceeding related to this case, and that could prove to be embarrassing.

Do you understand that?

A. I understand.

Q. This is not a test to just get this done as soon as possible. We're not under any time constraints, so if you have to take a break, let me know, and if you have to confer with your counsel, let me know. Take your time in responding to the question. Also, I'm not here to trick

* * *

[10] A. USC.

Q. When did you graduate?

A. 1985.

Q. Where did you go to law school?

A. Loyola Law School in Los Angeles.

Q. Going back to your undergraduate, what was your major?

A. I had two. I had a bachelor of science in public administration and bachelor of arts in English.

Q. When did you graduate from Loyola?

A. 1989.

Q. What was your class ranking?

A. I don't know. I don't remember.

Q. Would you say it was more top half of the class or bottom half of the class?

A. I would say top half, but I really don't know.

Q. You're currently employed by the Los Angeles County District Attorney's office?

A. Yes.

Q. And you are a Grade 3?

A. Yes.

Q. What's your current assignment?

A. The Public Integrity Division, which is currently housed in the Criminal Courts building Downtown, but that's only for the remainder of the month. [11] They're going to move to another building across the street in the Hall of Records.

Q. But it will still be the Public Integrity Division?

A. Yes.

Q. How long have you been assigned there?

A. About four weeks now.

Q. So that would make it from April?

A. 1st of April.

Q. And that assignment is until when?

A. They don't really give a – when they assign you to an office, they don't tell you it's for a certain period. You're just there until they decide to send you somewhere else, or you request to be sent somewhere else, so it's open.

Q. So the assignment could be for another one year, or it could be for another five years?

A. Yes.

Q. Do you have intentions currently to request for a new assignment?

A. No. No, I like what I'm doing.

Q. And what specifically do you do there?

A. The unit concentrates on public officials, politics, elected officials, focuses on corruption involving public officials, misuse, misappropriation of

* * *

[13] violation of an election law code. We may – or I may do the initial evaluation to see if there's more to it, if there needs to be an investigator assigned, or even assuming everything they say is correct, is there, in fact, a violation that can be prosecuted.

A lot of times we'll review something, and clearly there's something wrong, but it's not a violation of any statute or code, and it will, of course, end right then and there.

Q. How long have you been employed with the L.A.D.A.'s office?

A. I'm in my 12th year. I started in 1989.

Q. So you went to the Los Angeles District Attorney's office right after law school?

A. Yes.

Q. So that was your first legal job?

A. Yes.

Q. Let's go down memory lane. Let's talk about your career at the D.A.'s office.

A. Okay.

Q. Prior to the Public Integrity Divisions, which you started in April, on April 1st of this year, where were you assigned?

A. To the El Monte area office.

Q. And for what period of time?

* * *

[15] MR. BECERRA: I'm sorry. Let me do a late objection as vague and ambiguous, and do a late objection to strike.

Q. BY MS. LEE: And prior to the El Monte area assignment, where were you assigned?

A. To the Pomona branch office.

Q. For what period of time?

A. I believe it was sometime beginning either late 1997 or early 1998. I don't recall exactly when I was sent there.

Q. What was your title there?

A. I don't know if we had any formal titles. I think at one point – I mean, we're all classified as grades, but at one point, I was a calendar deputy, and at another point, I was a trial deputy.

Q. Do you know what period of time you were a calendar deputy versus a trial deputy?

A. Initially upon being assigned to Pomona, I was a trial deputy. After about maybe nine months, maybe a year, then I was assigned as a calendar deputy. That lasted up till – for approximately a year until maybe May or June of 2000.

Q. What were generally your duties and responsibilities as a calendar deputy?

A. Before the courts consolidated, I was assigned [16] to one court, and this particular court was Judge Milton. All the cases that were funneled to that one court, I reviewed. These are all cases that aren't specially assigned to either domestic violence or hard-core gang or any of the other special units. I would review the cases coming in for arraignment, make appropriate offers, and try to settle the case.

I handled any preliminary motions, matters, or discovery, and if it appeared that the case would not settle, then I would assign it to a number of deputies that worked in that courtroom under me, that varied from either one to three deputies, and it was just a matter of – depending on their skill level – picking a particular case that was commensurate with their skill ability and then assigning the case to them and continuing to evaluate the progress of the case and assist the younger deputies in preparing the case if it did go to trial.

Q. Who was your immediate supervisor or supervisors in the Pomona branch?

A. Carol Najera and Frank Sunstedt, although not initially. Frank Sunstedt was the head deputy there when I first arrived. There was another assistant head deputy by the name of – I think it's Abe Weisbrodt, W-e-i-s-b-r-o-d-t. He was there maybe nine months when I

* * *

[18] Pomona.

Q. So about September of 2000 – I'm sorry, about late 1997, '98?

A. Yes.

Q. What did you do there?

A. I handled sex crimes, child abuse, child molestation, rapes.

Q. Were you still, back then, a Grade 3?

A. I was made a Grade 3 during my time that I was in sex crimes. I believe it was '96 maybe.

Q. Who was your immediate supervisor there?

A. My first supervisor was Lawrence Weis, W-e-i-s. My second supervisor was James Blissert, B-l-i-s-s-e-r-t.

Q. And prior to the sex crimes unit, where were you assigned?

A. I was assigned to the Norwalk branch area. Although I think I was actually working in the Huntington Park area office as a filing deputy, but I think I was just actually on loan from Norwalk to Huntington Park.

Q. For what period of time was that?

A. I don't remember, maybe six months.

Q. Do you know who your immediate supervisor there was?

A. John Allen, A-l-l-e-n.

Q. Prior to then, what was your assignment?

* * *

[24] opportunity to vertically prosecute any of those other assignments?

A. Yes, yes. In murder cases, you typically were – they were vertically assigned to be prosecuted, so in Norwalk and Pomona, I was assigned murder cases to vertically handle, and in some of the area courts, I recall being assigned cases to handle from the inception, or close to the time of inception, up to trial.

Q. Let's talk about the El Monte assignment.

A. Okay.

Q. When were you first notified that you would be assigned to El Monte?

A. When your client, Carol Najera, called me into her office and informed me that my position –

MR. BECERRA: Let me object as being nonresponsive and request that you reread the question. Just answer the question, okay? And I think we'll move more quickly.

THE WITNESS: Okay. I'm sorry.

MS. LEE: I thought he was doing fine, but –

MR. BECERRA: I know you did, but the question was: when were you notified?

THE WITNESS: Oh, end of August, maybe beginning of September.

Q. BY MS. LEE: Of last year?

A. Yes.

[25] Q. Can you describe the circumstances in which you were notified?

MR. BECERRA: Let me object. Calling for a narrative.

THE WITNESS: Your client, Carol Najera, called me into her office and told me that I would be moving, if you will, or changing positions. I could either – if I wanted to remain in Pomona, I would have to file misdemeanors. If not, she was going to send me to the El Monte area office to file felonies.

Q. BY MS. LEE: So you were given the option of staying in Pomona and filing misdemeanors versus being assigned to El Monte?

A. Yes.

Q. Did she indicate why?

A. Not that I recall.

Q. Did you ask why you were being assigned?

A. I may have, but I don't recall a response, if any.

Q. You don't recall responding to her in any way?

A. No. I'm saying I don't recall if she had a response.

Q. Did you have – what was your response?

A. When she – when Carol Najera asked me to choose, I told her I would not choose.

* * *

[27] Q. Yes. What was it about the options that she gave you did you perceive to be a continued form of retaliation?

MR. BECERRA: Object for the record as calling for narrative, but, you know, you can respond.

THE WITNESS: Okay. Given my experience, and a number of years being in the office, the cases I had been involved in and tried, the fact that I had been a calendar deputy, to have somebody of my experience, or caliber, if you will, filing misdemeanors in Pomona simply wasn't appropriate. It was demeaning. Filing misdemeanors is typically left to either a Grade 1 or a Grade 2. In fact, I think they had a Grade 2 at the time filing misdemeanors. It wasn't something that was typically left solely for someone as a Grade 3 filing.

And then the option of going to El Monte was a – it was characterized as freeway therapy. I was being punished by being forced to drive a greater distance to a farther location away from where I lived. With traffic, it would result in a much more extensive commute. I believe the commute I had at the time was probably no more than five or ten minutes. The commute, however, was going to change to approximately 40, 45 minutes.

Q. BY MS. LEE: You said it was characterized as

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[29] deputy, and this is for an area court. That El Monte office is not – is not an area – is not a courthouse that required the services of three filing deputies, and in many – by me being sent there to file cases, even though there were two other filing deputies there, I knew I was going to be sitting around doing nothing, and, in fact, a lot of times that's what, in fact, happened. I might do some work in the morning, but in the afternoon there wasn't any work to do.

Q. Anything else about the El Monte assignment option that you perceived to be continuing retaliation?

A. Other than the fact that I remained there.

Q. Let's talk about that. So you're saying your duration at the El Monte assignment also caused you to believe that was a continued form of retaliation?

A. Sure.

Q. What about the duration?

A. I'm not sure I understand your question.

Q. Well, I'm just trying to understand how it was that you perceived the El Monte assignment as being a continued form of retaliation. You mentioned a couple of things, and the last thing was duration, the fact that you remained there.

A. Right.

Q. Were you only supposed to be there a certain

* * *

[32] A. Right.

Q. I think you indicated that you considered that option to be demeaning?

A. Right, among other reasons.

Q. And that's one of the reasons why you perceived that as being a continued form of retaliation?

A. Yes.

Q. What else made you perceive the Pomona option as being a continued form of retaliation?

A. Well, again, you had somebody who had been in the office, I think then maybe 11, 12 years, who had significant experience, worked as a calendar deputy. And to take something like that, of that caliber, and put him in a position where they're simply going to be dealing with misdemeanors is really a waste of – an incredible waste of resources, and the only reason to do something like that is either simple incompetence on the part of the management or a deliberate attempt to retaliate for past conduct. There would be no other reason to have somebody of my caliber doing that type of job.

MR. BECERRA: I'm sorry? Did you say caliber?

THE WITNESS: Caliber.

Q. BY MS. LEE: To your knowledge, prior to then, nobody of your caliber had been assigned as a filing deputy for misdemeanors in Pomona?

[33] MR. BECERRA: Objection. Vague and ambiguous as to "caliber."

THE WITNESS: That's correct. I think the person that was doing it at the time was a part-time Grade 2 deputy.

Q. BY MS. LEE: How many felony trials had you had at the time?

MR. BECERRA: At the time of the transfer?

Q. BY MS. LEE: And at the time that the option was given to you between Pomona or El Monte.

A. Approximately 50.

Q. Well, let me get your definition. I mean, caliber is a word that you used, so that's what why I was using it. What do you mean by that, someone of your caliber?

A. Experience.

Q. And experience means what specifically?

A. Experience in terms of just years in the office; number of trials; positions held before that, such as calendar deputy; the fact that I worked in the special unit; the fact that I handled murder cases before. You know, you put somebody with my experience in that position and you had other D.A.s with much less experience still handling felony matters including murders.

* * *

[37] Q. BY MS. LEE: You can answer.

A. I don't think there was a need. I think what Ms. Najera did was not based on any need. I think it was just based, again, on continued retaliation.

Q. What causes you to believe that?

MR. BECERRA: Well, let me object as asked and answered several times.

Go ahead and answer it again.

THE WITNESS: My contact with Ms. Najera and Mr. Sunstedt from the period of time beginning of March to the time where Ms. Najera gave me this option, my belief was that anything or almost anything Ms. Najera and Mr. Sunstedt did was a form of retaliation because of my conduct in the Cuskey case.

Q. BY MS. LEE: My question, though, specifically is with regard to the Pomona assignment, the filing misdemeanors assignment. Did you verify whether or not that was, in fact, an open position, or if that was a needed position? I'm just trying to find out from your perspective. Did you confirm through objective sources that this was really just not even an available position?

MR. BECERRA: Let me object as vague and ambiguous, and it's kind of three questions, so its beyond compound. I just don't know what the word is, so let me object to the form of the question, and beyond compound [38] and vague and ambiguous.

Q. BY MS. LEE: Do you understand the question?

A. I think so.

Q. Can you answer it, please.

A. After I was transferred to El Monte, it appeared that no one else was sent or assigned in the Pomona area to handle those misdemeanors.

Q. And how do you know that?

A. Talking to other D.A.s.

Q. Like who?

A. Again, maybe Mike Grosbard.

MR. BECERRA: Can I withdraw my objection?

Q. BY MS. LEE: Anybody else?

A. Again, I'm sure there were other D.A.s. I had a lot of friends there in Pomona, and I know I talked to them on a regular basis, but I don't – I don't remember who I got the information from, if it was just Mr. Grosbard or if it was Mr. Grosbard and other deputies.

Q. How long after the conversation with Ms. Najera where she offered you these two options were you actually notified that this is where you were going to be assigned to?

A. That same day.

Q. So that same day she gave you the options, you

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[40] Q. So then she gave you the option, you said you're not going to choose, but you didn't give her any reasons why you weren't going to choose?

A. I may have given her some reasons, but I don't recall.

Q. And her response was what specifically?

A. I remember leaving the office, and I think just before I left the office she indicated – or she told me that she was sending me to El Monte, and I left the office. I was walking down the hall, and she came after me again – or

walked towards me again, and again offered me the option.

Q. What was your response?

A. It was the same, that I would not choose.

Q. In your mind, were either of those options – strike that. In your mind, was one worse than the other?

A. They were both bad because they were options based upon retaliation. I mean, what she was doing was basically trying to get rid of me or punish me for what I had done in the Cuskey case, so it really wasn't an option. It was, Do you want to be shot, or do you want to be hanged? That's how I took it.

Q. Well, that's what I'm trying to get at. From your perception, when Ms. Najera gave you the option of staying in Pomona, but filing misdemeanors, or going to

* * *

[43] El Monte?

A. Right.

Q. And after you were transferred to El Monte in late August or early September of 2000 and until today, have you seen Ms. Najera?

A. I don't think so, maybe on a Saturday seminar, but.

Q. But you haven't had a conversation with her between the time that you were transferred to El Monte and today?

A. No, no, I don't think so.

Q. What about Mr. Sunstedt? When was the last time you had any conversation with him?

A. Wow. I think he stopped talking to me, if not late June, maybe sometime in July where he just ceased all communication with me. He wouldn't even say good morning.

Q. Would it be accurate to say that as of late June or July of last year that you haven't had any verbal contact with Mr. Sunstedt?

A. That would be correct, yeah.

Q. When was the last time you actually saw him?

A. Saw him. It would have to be probably before my transfer to El Monte, but exactly when that was, I don't know, because he would take a lot of vacations. I don't [44] know if he was there the week before I was transferred to El Monte or if it was a week before that.

Q. Do you recall the first instance of retaliation that you experienced from either Ms. Najera or Mr. Sunstedt?

A. Yes.

Q. When was that?

A. It was probably shortly after the meeting with the sheriff's department and with Captain Binkley, B-i-n-k-l-e-y, and Lieutenant Barstow, B-a-r-s-t-o-w. Maybe within a few days of that meeting, so it would have been March of 2000.

Q. Let me try to see if I can narrow down the time frame. We know that you prepared a memo to Mr. Sunstedt dated March 2nd, 2000; is that correct?

A. That was the first memo, yes.

Q. First memo. How many days or weeks after that memo would you estimate was the meeting with Captain Binkley and Lieutenant Barstow?

A. I believe it was March 9.

Q. So within a few days of the March 9, 2000, meeting, that's when you first experienced retaliation from Ms. Najera and Mr. Sunstedt?

A. From Mr. Sunstedt, yes, within a few days to a week.

[45] Q. What about from Ms. Najera?

A. I don't have any special recollection of her being present in the room with Mr. Sunstedt, but I'm not positive.

Q. My question, though, was approximately when did you first experience retaliation from Ms. Najera?

A. Maybe about a week or so after the meeting as well, maybe a couple of weeks.

Q. Would it be accurate to say that you experienced retaliation from Ms. Najera after experiencing the first retaliation from Mr. Sunstedt?

A. They were close in time, but I mean, my recollection right now is that Frank Sunstedt retaliated first, and then Carol Najera retaliated soon thereafter.

Q. What was the first event or the first form of retaliation that you perceived from Mr. Sunstedt?

A. The first act was when Frank Sunstedt informed me that I would no longer be a calender deputy.

Q. And when was that? I'm sorry. We already went over that. Describe the circumstances in which this occurred.

MR. BECERRA: Let me object as vague and ambiguous. Also calls for a narrative.

THE WITNESS: He called me into his office and simply informed me that I would no longer be a calendar deputy, [46] and that I would go back to doing trials.

Q. BY MS. LEE: You were the only one with him in the office when he said that?

A. I believe so.

Q. And at the time, you were a calendar deputy?

A. Yes.

Q. So you were the calendar deputy of Pomona at the time?

A. I was a calendar deputy for Department E.

Q. Is that Judge Milton's courtroom?

A. Yes.

Q. What about Michael Grosbard? Wasn't he a calendar deputy at some point?

A. He was a calendar deputy for – I believe his name was Judge Gustafason, G-u-s-t-a-f-a-s-o-n.

Q. Did he give you any reason as to why you would no longer be a calender deputy?

A. No.

Q. Did you ask?

A. I don't believe I did, no.

Q. How long was this meeting?

A. Short, less than five minutes.

Q. So basically, was the substance of the meeting Mr. Sunstedt telling you you would no longer be a calendar deputy, but you would be a trial deputy, and [47] pretty much that was it?

A. Pretty much.

Q. And why did you perceive that as being a form of retaliation?

MR. BECERRA: Objection. Calls for a narrative.

THE WITNESS: Because that occurred shortly after the meeting with the sheriff's department, and it was after the meeting with the sheriff's department is when I confronted Frank Sunstedt, and I basically questioned his ethics and his – and accused him of kowtowing to the sheriff's department, of ignoring the fact that these deputy sheriffs had lied, and of setting aside his obligations simply to appease the sheriff's captain and lieutenant.

Q. BY MS. LEE: When did you have this conversation with him where you made these type of allegations directed at Mr. Sunstedt?

A. Right after the meeting with the sheriff's department.

Q. The same day as the meeting?

A. Yes.

Q. Were you alone with him?

A. I believe so, but I'm not positive.

Q. What was Mr. Sunstedt's response to his accusations right after the meeting?

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[51] longer a calendar deputy?

A. Right.

Q. What was the distinction in your mind between being a calendar deputy or just a trial deputy?

A. The distinction in my mind or the distinction in the mind of the D.A.'s office?

Q. Well, let's talk about both. Is there a difference between what you were thinking – well, the difference in your mind versus what you perceived was the distinction by the D.A.'s office?

MR. BECERRA: Let me object as being vague and ambiguous.

THE WITNESS: I understand. A calendar deputy is a position of some prestige. It's not quite the same as being a head deputy or a DIC, but you do have some supervisory responsibility. You're not only there in the courtroom every single day interacting with the judge and the defense attorneys trying to negotiate dispositions

for all these cases, and perhaps a number of cases, but you're also there as a supervisor and a mentor, if you will, to these younger deputies that are assigned to the court.

So there's a lot of responsibility being a calendar deputy. You're not only handling the cases, you're not only handling all of the cases that come [52] through that courtroom, not only are you representing the office for your particular judge that you're assigned to and all these defense attorneys, but you're also shaping these younger deputies on how to be good prosecutors, as opposed to simply being a trial deputy, you're just concerned with yourself and no one else.

Q. BY MS. LEE: From a promotable standpoint, were those considered, the fact that you had experience or assignment as a calendar deputy versus trial?

A. Oh, yes, absolutely. Being a calendar deputy is, I think, a factor that the office looks at in deciding who to promote.

Q. And the difference between a calendar deputy and just being a trial deputy, that you just described, is that your perception of what the differences are, or is that how you perceive the D.A.'s office's perception?

A. I think it's not only my perception. I think it's the perception of most D.A.s in the office with the exception of older D.A.s, the dinosaurs, if you will, but I think generally the perception of the D.A.'s office is – being a calendar deputy is a nice place to be, a nice position to hold.

Q. And why did you say that there might be a different perception with the older D.A.s?

A. Just because the older deputies may be [53] pessimistic about everything just because they're older deputies. They've probably been in the office 30 years, and they don't like anything.

Q. In terms of your position as a calendar deputy, at the time, who did you have supervisorial responsibility over?

A. I remember one was Steven Gallon, G-a-l-l-o-n. I know there are others, but their names just escape me right now. I know they'll come to me. I can't think of their names right now, but it will come to me.

Q. Was it two then, two deputy D.A.s?

A. Generally two, but sometimes I remember having as many as three D.A.s.

Q. How long were you a calendar deputy at the time Mr. Sunstedt advised you that you would no longer be a calendar deputy?

A. I think about a year.

Q. So other than the conversation that you had with Mr. Sunstedt after the meeting with the L.A.S.D. personnel on March 9, was there anything else that caused you to form the belief that Mr. Sunstedt's advising you that you would no longer be a calendar deputy was a retaliatory act?

A. Not completely – I'm not sure I fully understand the question.

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[55] it was retaliation. It wasn't until as time went on and further acts of retaliations by Mr. Sunstedt and Ms. Najera that I – that it finally dawned on me, "Wait a minute. These people are punishing me because of what I did."

Q. Let's talk about what it is that you did. You wrote a memo – I think this all started with the memo prepared March 2, 2000, directed to Mr. Sunstedt?

A. Yes.

Q. And let me back up since we're already on this topic of the meeting, the March 9 meeting.

A. Okay.

Q. Who was present at that meeting, other than Captain Binkley, Lieutenant Barstow, and Mr. Sunstedt?

A. Carol Najera and Steven Gallon, G-a-l-l-o-n.

Q. And that was held where?

A. In Frank Sunstedt's office there in the Pomona branch office.

Q. What was your understanding about the purpose of the meeting?

A. Frank Sunstedt told me that he had faxed a copy of my memo dated March 2nd. I don't know if he had faxed my supplemental memo. I think that was dated maybe March 6th, or around that time. He told me that he had received a phone call from Captain Binkley and that [56] Captain Binkley was demanding a meeting with the D.A.'s office prior to our moving to dismiss the case against the defendants.

Q. It probably wouldn't make sense to proceed to the meeting until we talk about the memo, so my fault.

A. Okay.

Q. So let's talk about the March 2, 2000, memo. That's what initiated, I guess, your grievance, correct?

A. I don't know if that initiated the grievance. I mean, that was the start of this entire process.

Q. So this March 2nd, 2000, memo, what was the circumstances in which you prepared this March 2 memo?

MR. BECERRA: Objection. Calls for narrative.

THE WITNESS: I was working as a calendar deputy. I was approached by an attorney, a defense attorney, by the name of Richard Escobedo, E-s-c-o-b-e-d-o, I believe. He was the defense attorney for one of the defendants. I don't know which defendant. He had asked me to review a case that I had actually assigned to Mr. Gallon.

He had basically said he believed that the deputies in the case had lied on a search warrant, and I told him to go ahead and file his motion. He indicated he already did, that it was on calendar for a motion, but that he really wanted to talk to me because he didn't – I guess he – as he stated, he wasn't – I want to say [57] happy, but he wanted somebody other than Mr. Gallon, somebody who had more experience to review the case.

Q. BY MS. LEE: Was that unusual for a criminal defense attorney to come to a calendar deputy about an issue that popped up in a case that had been filed by the D.A.'s office?

A. No.

MR. BECERRA: Objection. An incomplete hypothetical.

THE WITNESS: No, not at all. It happens quite a bit, and it depends upon the D.A. It depends on your reputation with the defense bar. I mean, if the defense bar trusts you, trusts the D.A., and they think the D.A. is fair and will seriously look at a case, they will approach you and ask, "Can you please look at a case again more closely?"

Q. BY MS. LEE: So as a calendar deputy, you have had instances where you had a criminal defense attorney come up to you to look at a case that had been filed by the D.A.'s office prior to this incident?

MR. BECERRA: Let me object as vague and ambiguous. Did you say "look at"?

Q. BY MS. LEE: Well, the same type of scenario Mr. Escobedo presented generally.

Do you understand the question?

A. Yeah. I don't know – yes, I do understand the

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[59] at one point I said, "If you really want to talk to me, you're going to have to wait until the recess."

Q. Did you know Mr. Escobedo before this, then?

A. I don't think I've ever dealt with him before. I mean it's possible that I dealt with him, but I don't think we've had any real interaction before that.

Q. And did you know of his name, his reputation, or anything like that?

A. No.

Q. And this case, People v. Cuskey, was assigned to that department that you were the calendar deputy in?

A. Yes.

Q. And that's presumably how Mr. Escobedo sought you out as opposed to anybody else?

A. Right, because I was calendar deputy.

Q. In fact, there was a subsequent conversation that you had with Mr. Escobedo?

A. Yes. After things had calmed down, the judge took a recess. That's when he spoke with me and explained his position. I don't know if the file was up there or not. It may have been, or Mr. Gallon may have been up there with the file. I may have – after speaking with Mr. Escobedo, I may have asked Mr. Gallon for the file back and told Mr. Escobedo, "Okay, I've heard you. I'm looking into it."

[60] Q. Was this the same day?

A. I think so. I believe so.

Q. If you wrote the memo, the first memo, on March 2nd, 2000, can you approximate for me how long before the preparation of that March 2 memo that you had this conversation with Mr. Escobedo?

A. No. I would assume that – not really an assumption, it's probably a good guess – probably a week to two weeks before that memo.

Q. So then you obtained a copy of the file, you obtained the file from Mr. Gallon?

A. Yes.

Q. From the People v. Cuskey case?

A. Right.

Q. Did you review that file?

A. I think I spoke to Mr. Gallon about it briefly.

Q. What was said to him, and what was said by him?

A. I don't remember. I may have asked him his opinion, what he had done on the case. I asked him for a summary of the case, just to get his initial impressions about the case, and then I read the file completely.

Q. What was Mr. Gallon – what did he tell you about the case? What was his initial impressions to you?

A. There's nothing that stuck out about what Mr. Gallon said. It's just – Mr. Gallon was a younger

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[62] A. I'm sure I probably started reading the file sometime that day. I doubt I finished reading the file. It probably took me a couple of days to read the file. I'm only guessing at this point.

Q. Can you estimate for me how big that file was at the time? In other words, was it a newly filed case, or was there some discovery – I'm sorry, not discovery. Was there substantive stuff in the file?

A. If the case was filed in 1999, I believe probably towards the latter part of 1999, and there was three defendants – and any time you have multiple defendants, it's going to be thicker than if you just have one defendant. I mean, I don't believe it was overwhelming. It was just –

you know, I really can't characterize how thick the file was.

Q. What were your impressions upon reviewing the file?

MR. BECERRA: Objection. Vague and ambiguous. Also calls for a narrative.

THE WITNESS: After I spoke to Mr. Escobedo, I reviewed the file. My initial impressions were, I've got to look into this further.

Q. BY MS. LEE: What was it about the review of the file that caused you to believe that?

A. I reviewed the search warrant in detail, and [63] paid particular attention to the language of the search warrant and the description of the property, and then Mr. Escobedo provided me with photographs as well as a videotape depicting the area in question, and I remember comparing the photographs and the videotape with the description of the warrant and noticing that there was an obvious difference.

There was clearly a mischaracterization of the description of the property. The way the deputy had described it in the warrant did not at all match what the photographs were depicting.

Q. Specifically, how did the deputy describe the property?

A. The deputy characterized the driveway simply as a long driveway, and this would be the driveway where two other deputies had actually observed tire tread marks

leading from the street up this long driveway to the defendant's property.

When I first read the warrant and I read the long driveway, my impression was, "Okay, this is maybe a driveway that's 20, 30, 40 feet, and accessed by only one residence or one occupant of the property." Where in reality, looking at the photographs, this wasn't so much a driveway as it was a separate road or accessway that was – from looking at the photographs was several [64] hundred feet long, was approximately three or four car lengths wide, and there appeared to be numerous homes, residences, single-family residences, bordering this access road, and my impression was, How can the deputies say that these tire tracks came from the defendant's home when you have all these other homes that have to use this same roadway to make ingress and egress to their respective properties?

Q. So one of the triggering factors was a discrepancy between the description of the driveway that the deputy made on the warrant versus the photographs of what this driveway was supposed to be?

A. Right.

MR. BECERRA: Objection. Misstates his testimony.

THE WITNESS: That would be one of them.

Q. BY MS. LEE: What else?

A. Well, I think that would be the red flag that I first – that forced me to look into it further.

Q. Let me ask you this: Did Mr. Escobedo indicate to you that that's something that you should look at, or did he give you any clues as to what it is that you should be looking for in the search warrant?

A. Yes.

Q. So that's something that he had mentioned to you in his prior conversation, that to take a look at the

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[69] question. I made a rough estimate that the overall length of this access road was approximately 300 feet. I then, based upon the police reports that I had in front of me, was able to make another estimate as to the area where the deputies found the stripped pickup truck and made an estimate based upon that distance.

And then I drove up and down this so-called driveway, or the access road, in my truck to see whether or not I would leave discernible tire tracks, or tread patterns, and determined that I could not over the majority of the driveway. I think there was an area further towards the end where you could get some tire tread marks, but to go the entire distance of that driveway is, in my opinion, is impossible.

Q. So upon reviewing the photographs and the videotape, as well as actually going to the scene, you would have characterized that property area to be more of an accessway instead of driveway?

A. Oh, absolutely. Characterizing it as a driveway was a complete misrepresentation of that area. It was not a driveway.

Q. And then you further concluded that there was no way that – well, strike that. What else did you conclude with regards to the veracity of what was contained in that search warrant upon your on-site [70] investigation?

MR. BECERRA: Objection. Calls for a narrative.

THE WITNESS: I had called the affiant of the warrant, Detective Keith Walls.

Q. BY MS. LEE: Had you known him before this?

A. No.

Q. You didn't know his reputation or anything like that?

A. No, not at all.

Q. What about the other deputies involved in the search or arrest?

A. Did I contact them?

Q. No. Did you know them at all?

A. Before this happened?

Q. Right.

A. No.

Q. Who were they?

A. Deputy Simpkins and Deputy Spitulski, S-p-i-t-u-l-s-k-i.

Q. So Deputy Walls was the affiant on the search warrant that we've been talking about?

A. Yes.

Q. And Deputy Simpkins and Spitulski were who?

A. They were the deputies that found the pickup truck that was stripped and allegedly followed the tire [71] tread patterns up this access road to the defendant's property.

Q. So you had – we're talking about the further observations and conclusions that you made upon your on-site investigation.

A. Right.

Q. So what were they, other than what you've already testified to?

A. I think that was it, other than the general physical nature of the roadway, and the fact that in my opinion, there's absolutely no way you can have discernible tire tracks or tread patterns that entire distance.

Q. So you concluded at that point that there was a problem with the search warrant?

MR. BECERRA: Objection. Vague and ambiguous.

THE WITNESS: I wouldn't say I concluded it at that point. I hadn't reached my conclusion yet, but again, it was another red flag.

Q. BY MS. LEE: And what else did you do to follow up?

A. I called and spoke with the affiant, Detective Walls.

Q. What was the subject of that conversation?

A. I discussed with him the fact that the defense [72] had filed this motion and what the motion was. I described to him – and I think I basically told him what the allegations were, and I said, "Detective, you need to understand the defense is alleging that these tire tracks that were referred to in your search warrant never existed at all. In fact, they were –" I'm not sure what term I used – maybe a figment of the deputy's imagination, that they had lied, that they had made up the fact that they had seen these tire tracks.

And I remember his response to that because I wrote it down. His response upon me telling him what these allegations were was, "Well, that's what they told me," referring to the deputies. It was almost like, "Well, I'm washing my hands of this, because I'm only relying on what these Deputies Simpkins and Spitulski told me."

Q. At that time, had you actually seen a copy of the motion to traverse that was filed by the defense attorney?

A. I think it was in our file, yes.

Q. Anything else that was said by you to Detective Walls and by Detective Walls to you, that sticks outs in your mind?

A. Not at that time, but I did have another phone call, interview or conversation with him, a few days [73] after that.

Q. But at that initial conversation with him, did you mention anything about the driveway versus accessway also?

A. I don't know.

Q. What was the next thing that you did?

A. In fact, I don't think I told – I don't think I talked to him until after I completed my first memo.

Q. So –

MR. BECERRA: I'm sorry. I didn't hear his answer. Is he saying, I didn't talk to him on this phone call before the first memo?

(Answer read.)

Q. BY MS. LEE: So your first conversation with Dr. Walls was after you wrote that March 2nd memo?

A. I believe so, but I'm not positive. I know we were trading phone calls back and forth, and I know we had two conversations. I'm just not sure of the timing.

Q. Obviously, by the time you wrote the March 2 memo, you had drawn the conclusion that there were problems with the search warrant?

A. Yes.

MR. BECFRRA: Objection. Vague and ambiguous as to the term "problems."

Q. BY MS. LEE: I'm just trying to find out what [74] things between the time that you had the initial conversation with Mr. Escobedo and the time you actually prepared the March 2 memo; what had transpired to lead you to that conclusion? And we've been going over going to the scene.

A. Right.

Q. And after that, you still had not made a conclusion about the search warrant?

A. I think what I did is after I made the on-site inspection, I came back to the office, and I started talking to my colleagues, my other deputy D.A.s, and asked them their opinions, and I showed them the photographs, and a couple of them, I think, I even had them sit and watch the videotape, and I gave them the factual scenario, and I said, "What do you think?" And you know, every single one of the people I asked said, "Yeah, there's a problem with this warrant."

And I think at that point, that's when I brought in your clients, Carol Najera and Frank Sunstedt. I don't know if I did it with both of them or together or separately, but I showed them the videotape. I showed them the photographs. I told them what I saw, and they basically said, "Yep, there's a problem."

Q. Other than Carol Najera and Frank Sunstedt, who else did you show the pictures and the videotape to and

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[87] until it was resolved one way or the other, which is normal practice. We do that all the time. I may have assigned a case to a younger deputy, an evidence problem arises, and I'll take the case back from that deputy and resolve it.

Q. BY MS. LEE: How long was this initial conference, or conversation, with Ms. Najera and Mr. Sunstedt?

A. It wasn't short because I remember I had to explain to them the facts of the case. I had to show them

the photographs and show them the videotape, so it took a little bit of time. Not – I wouldn't say an hour. Half hour, maybe less.

MS. LEE: Lets go off the record.

(Recess was taken from 12:43 p.m. to 1:38 p.m.)

MS. LEE: Back on the record.

Q. What was the purpose of your March 2, 2000, memo, the memo to Frank Sunstedt?

MR. BECERRA: Objection. Lack of foundation.

THE WITNESS: It basically was the disposition report, or was going to be the disposition report for dismissing the case.

Q. BY MS. LEE: And that's just to memorialize what – strike that. So a disposition memo that recommended dismissal of the case?

[88] A. The disposition report is essentially an explanation as to why a case is being dismissed or has been dismissed.

Q. And you wanted the case to be dismissed?

A. That was my recommendation.

Q. Who did you send the memo to?

A. Frank Sunstedt.

Q. Was he the only person?

A. Yes.

Q. What response did you receive from him?

A. You know, I actually prepared the memo, and he edited it about two or three times. He wanted me to take – change some language, some wording. He wanted the tone of the memo to be less accusatory because he told me he wanted to send it to the sheriff's department to explain – so they would know the reason why we were dismissing the case.

Q. Had you done disposition reports before?

A. Yes. All – any cases we've ever handled, we do a disposition report.

Q. And so it was customary to give it to the head deputy to review?

A. The disposition report always must go to the head deputies because they have to sign off on it.

Q. Was it unusual that Mr. Sunstedt was requesting

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[90] A. No, not when I wrote it, no.

MR. BECERRA: Objection. Motion to strike. calls for speculation, also an opinion, also a conclusion.

Q. BY MS. LEE: So in preparing the March 2 memo, it wasn't your intent to make accusations about any of the detectives involved in the Cuskey case?

MR. BECERRA: Objection. Vague and ambiguous. Calls for conclusion also.

THE WITNESS: My intent was to explain the reason for the dismissal or the request for a dismissal.

Q. BY MS. LEE: How did you respond to Mr. Sunstedt's request to edit your disposition report?

MR. BECERRA: Objection. Vague and ambiguous as to the different requests for different parts. What part are you asking about?

THE WITNESS: I complied with his request. He explained to me why he wanted it done, and I did it.

Q. BY MS. LEE: What did he offer as an explanation of why he wanted the editing done?

MR. BECERRA: Objection. Asked and answered.

THE WITNESS: He said because he intended to send it to the sheriff's department, he wanted to tone down the language of the – tone down the accusatory tone of the memo.

Q. BY MS. LEE: So you redrafted a whole new memo?

[91] A. No. I didn't redraft it. He made – on the draft I provided to him, he took a red pen, or some other colored pen, and made some crossings out, inserted some additional words, and then gave that back to me and said, "Make the changes." And I just made the change on the computer.

Q. Do you know what happened to that initial draft that you prepared that was edited to Mr. Sunstedt?

A. It was destroyed by myself.

Q. So today, do you have anything in writing that would accurately reflect what your original March 2 memo

reflected prior to Mr. Sunstedt making those proposed changes?

A. No.

MR. BECERRA: Would that include your log? Are you including that log we turned over?

THE WITNESS: I don't know if it's reflected in there. I don't think so.

Q. BY MS. LEE: At some point, you prepared the final March 2 memo which was approved by Mr. Sunstedt, correct?

A. Well, he signed off on it, so I took it as an approval, yes.

Q. What happened to the memo after that?

A. He told me that he was going to have it faxed [92] over to the sheriff's department, to the captain of Industry station.

Q. Did you have any response to that?

A. No.

Q. Did you have any problems with him doing that?

MR. BECERRA: Objection, vague and ambiguous.

THE WITNESS: No.

Q. BY MS. LEE: What happened to the Cuskey case after that?

MR. BECERRA: Well, objection. Calls for narrative, also calls for a conclusion.

THE WITNESS: I think within a day or so, the case was up for a hearing. I'm not sure what the nature of the hearing was. Frank Sunstedt had already received the calls from the captain of the Industry station asking for a meeting.

I advised Frank Sunstedt that there was still a defendant in custody, and I think that was Defendant Ojala, and Frank Sunstedt authorized, or gave me, the go-ahead to obtain his release from County jail pending the meeting with the sheriff's department.

Q. BY MS. LEE: So there was supposed to be a meeting with the sheriff's department prior to the hearing scheduled on the Cuskey case?

A. Prior to the scheduled motion to traverse.

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[97] statements, other than the formalities of exchanging who everybody was?

A. Pretty much.

Q. Did you guys have a copy of your memo there?

A. Yes, I believe we all did. I know the sheriff's department had it, or the lieutenant and the captain. I even think Detective Walls had a copy.

Q. And then at some point the conversation went from Walls and Sunstedt to the captain, correct?

A. No, Lieutenant Barstow.

Q. What was he saying?

A. Lieutenant Barstow turned towards me and basically started kind of ranting and raving, raising his voice saying, "I don't know who he thinks he is. He's not a prosecutor. He's acting more like a defense attorney. He's acting more like a public defender, and I want him off this case."

Q. Did anyone provide a response to that?

A. No. The defendants just sat there. I tried to.

Q. What do you mean you tried to?

A. Well, I tried to speak up, and Defendant Najera, who was sitting towards my left, kind of just put her hand on my arm and just said, "Just let him talk."

Q. What were you going to say?

A. You know, probably just yell back at him, like, [98] you know, "Who are you calling a public defender? Who are you calling a defense lawyer?"

Q. So Lieutenant Binkley –

A. No, Lieutenant Barstow.

Q. Sorry. Lieutenant Barstow just made this comment towards you?

A. It wasn't so much a comment as an attack, personal attack.

Q. Personal attack, and it wasn't prompted by anything?

A. No.

MR. BECERRA: Objection. Calling for conclusion. Lack of foundation.

Q. BY MS. LEE: So just prior to him attacking you verbally like this, what occurred?

MR. BECERRA: Objection. Lack of foundation, if anything occurred.

THE WITNESS: Nothing occurred. It was just – Detective Walls finished whatever he was saying, and then Lieutenant Barstow started speaking, and he just kind of turned his chair – he didn't turn his chair, his body in his chair in my direction and started making the accusations, or the attack.

Q. BY MS. LEE: So nobody at this meeting said anything to personnel at the sheriff's department about, [99] "Well, how do you explain this?" or, "How do you explain that?" Things that were reflected in your memo?

A. At this point, no.

Q. Yes?

A. No.

Q. No? What else occurred at the meeting?

MR. BECERRA: Well, let me object. Calls for a narrative.

THE WITNESS: After Lieutenant Barstow said the things he said, and I said a couple things to him, I think that's when Captain Binkley spoke up.

Q. BY MS. LEE: What did you say to Sunstedt and what did he say to you?

A. I didn't say anything to Sunstedt. I think I said it to Lieutenant Barstow.

Q. What did you say?

A. Lieutenant Barstow was saying, "Why don't you guys just put the case on? Let the judge decide. Let the jury decide who's telling the truth, if the detectives and the deputies lied." And my response to him was, "We're not potted plants here. We have to make an independent decision as to whether or not to go forward with the case. We just don't throw cases in front of judges and juries just because. We're here for a purpose."

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[103] talking about the motion to traverse. What is the defendant's burden on the motion traverse?

MR. BECERRA: Well, let me object again. That calls for expert opinion. Are you asking in general, or are you asking on this particular case?

MS. LEE: Generally.

MR. BECERRA: Then same objection. He's not a designated expert. Are you saying he's an expert?

Q. BY MS. LEE: You can answer.

A. They have – the motion to traverse goes underneath the warrant, as opposed to motion to quash, which is an attack on the four corners, or the face of the warrant.

Motion to traverse is basically an attack upon – it almost assumes that the warrant on its face is valid if you read everything on the warrant as is, but when you traverse a warrant, you're saying there are statements in this warrant, or there are omissions in the warrant, which if the judge who signed the warrant and reviewed the warrant had been made aware of them, that he would not

have signed the warrant, and that these omissions, or these statements, were done deliberately or in reckless disregard of the truth, so the burden is on the defense.

Q. And they can satisfy that burden by presenting [104] evidence in the form of witness's testimony, documents, that kind of thing?

A. Yes.

Q. And if a criminal defense attorney prevails on a motion to traverse, then what happens to that case?

MR. BECERRA: Objection. That's an incomplete hypothetical, and also calls for speculation and a conclusion.

THE WITNESS: Well, it depends. If the motion to traverse is granted, it doesn't necessarily mean the end of the criminal case. What you look for, and what I tried to do in this case, to see if there is any other possibility to justify the search warrant under any other exception.

And I've done that before. I've had a warrant quashed or traversed and still managed to proceed on the case, but I looked at this case to see if there was a way around the warrant, and there just wasn't.

Q. BY MS. LEE: At this March 9 meeting, it's your recollection that nobody confronted Detective Walls about the allegations that you made in your disposition report?

MR. BECERRA: Objection. Calls for a conclusion, and I object as to the form of the question, also argumentative.

THE WITNESS: Correct. He really wasn't questioned [105] at all in any detail. He did most of the

talking as to why he did – why he thought we were being hypertechnical.

Q. BY MS. LEE: Did you say anything else during this meeting?

A. I didn't say much at the meeting, other than what I already indicated.

Q. Did Mr. Sunstedt say anything during this meeting?

A. Yes. I mean, I know there was another exchange between Detective Walls and Defendant Sunstedt, and then either before that or just after that is when Captain Binkley brought up the issue that he wanted the case to go forward because he was fearful that the defendant would file a lawsuit against the sheriff's department, especially since they filed a lawsuit previously.

Q. You mentioned there was another exchange between Walls and Sunstedt?

A. Yeah.

Q. What was that about?

A. Same thing. It was basically the same thing.

Q. About Walls saying – criticizing your allegations?

A. Walls never really directed his attention

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[107] to let a judge or jury decide, other than what you testified to in terms of you responding?

A. No.

Q. Did anybody respond to captain Binkley's comments about his concerns about being sued?

A. No. Oh, you know what? I may have said something along the lines of, "Captain, that's not our concern. That's not one of our concerns."

Q. Anything else said by anybody present at the meeting?

A. Regarding that issue?

Q. Anything else.

A. No.

Q. Other than what you testified to.

A. No.

Q. How long did the meeting last?

A. 15, 20 minutes. I'm not positive.

Q. Were any voices raised during this meeting?

A. Yeah, Lieutenant Barstow's, maybe mine, and Detective Walls'. Although I don't know if his voice was raised like Lieutenant Barstow, but clearly upset.

Q. Was there any type of understanding that was, or agreement, that was reached after the meeting?

A. Yes.

Q. Let me rephrase. From the meeting, was there an [108] understanding or agreement reached about how this Cuskey case would be further handled?

A. At the conclusion of the meeting, it was understood that the case would proceed to the motion.

Q. What was the basis of your understanding?

A. Something that Frank Sunstedt said to – I don't know if he was directing it to either the lieutenant or the captain or even the detective, but there was something he said. I don't remember the exact words, but, "It's going to go forward with the – we'll go forward with the hearing."

Q. Did he indicate why?

A. No.

Q. And prior to this meeting, was it your understanding that the case was not going to go forward to a hearing?

A. Absolutely. It was my understanding the case was going to be dismissed.

Q. Did you respond in any way to Mr. Sunstedt's comments about the case going forward with the hearing?

A. Yes. After the meeting was over and the sheriff's department had left, I confronted him.

Q. Who was present?

A. I believe it was just myself and Defendant Sunstedt.

[109] Q. Is that the conversation that we discussed earlier?

A. Yes.

Q. And did you remember anything else about what Mr. Sunstedt said in response to your statements?

A. When I made the accusations?

Q. Correct.

A. No. No. The majority of what he did was stare at me.

Q. During the break, did you have an opportunity to review any other documents, anything else in preparation for your deposition?

A. No, just ate.

Q. So you haven't taken a look at your journal?

A. No.

Q. When was the last time you looked at your journal?

A. It's been some time.

Q. Couple of months?

A. Probably longer than that; probably when I went through the grievance hearing.

Q. What complaints do you have, or criticisms, about how you were treated during this meeting, if any?

MR. BECERRA: Objection. Compound.

THE WITNESS: Well, clearly I think my supervisors, [110] the defendants, should have interjected when Lieutenant Barstow began his personal attack on me. I don't think his attack was at all professional. It was unwarranted. It was uncalled for. It was just simply unprofessional, and either one of them should have stood up and said, you know, "Lieutenant Barstow, you're out of line here. We're all professionals here. Let's deal with this in a professional manner." But they didn't; they just sat

there and allowed this tactic to go on, and when I attempted to respond, I was quieted down by Defendant Najera.

Q. BY MS. LEE: Any other criticisms or complaints?

A. Well, yeah, when – I mean, other than trying to quiet the lieutenant down, they should have simply responded, "Hey, wait a minute. Don't come in here accusing one of our prosecutors of being a defense attorney. He's a prosecutor. He has an obligation, okay? That's a lot different from your obligation to arrest people. Our obligation is different. We're bound by ethical constraints. You may not understand them, you may not appreciate them, but we're guided by a different set of rules than you are. So that's the only reason why he's doing what he's doing. If you have a problem with that, that's fine, but express that in a professional manner."

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[114] drawn conclusions from speaking with the affiant, who had visited the scene of the incident, and when you have a D.A. that draws conclusions and forms an opinion to that extent, and then is subpoenaed by the defense to testify on behalf of the defense, there's now a conflict within the D.A.'s office.

Q. When were you subpoenaed by the defense on the Cuskey matter?

A. Maybe a week after the meeting with the sheriff's department, maybe less.

Q. You were personally served with a subpoena?

A. Yes.

Q. Did you at any time prior to the motion to traverse advise the criminal defense attorney on the Cuskey matter of your opinions relating to the search warrant?

A. Yes. At the hearing in which Defendant Sunstedt had authorized me to seek the release of Defendant Ojala, we couldn't find Defendant Ojala's lawyer, so I had Mr. Escobedo – or I requested Mr. Escobedo to stand in for that defendant, so I could get him released pending the outcome of the meeting and the matter overall, and I explained to him why I was doing what I was doing.

Q. And what did you specifically tell him?

A. That after speaking – well, after reviewing the

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[120] Q. What was their response and reaction, if any?

A. I remember Defendant Sunstedt stating something along the lines, "Yeah, I expected that."

Q. Any other response or reaction from him?

A. No.

Q. What about Ms. Najera?

A. I don't recall any reaction at all.

Q. Did you have any other conversations or contact with either Sunstedt or Najera between the time that you notified them that you were subpoenaed and the time of the motion to traverse hearing?

A. Yes, a couple of occasions with Defendant Najera. The first one dealt with providing copies of my memo to

the defense attorney. I explained to Ms. Najera that there was information in my memos, both the March 2nd memo and the March 6th memo, which were discoverable and should be turned over to the defense prior to any motion.

Q. What were the circumstances surrounding this suggestion?

A. When I informed her that it was my opinion that the memos were discoverable and should be turned over to the defense, Defendant Najera ordered me to prepare a new memo which contained only statements that Detective Walls had said to me when I interviewed him on the telephone [121] and to omit any and all other information.

Q. How did this conversation come about? In other words, did you just run into Ms. Najera and you said, "Oh, by the way, I think the memo should be turned over," or did she approach you about the memo? I mean, how did that come about?

A. I think shortly after I had advised them I had been subpoenaed, maybe that same day, if not, the day after, I approached Defendant Najera and indicated – or told her that these memos should be turned over to the defense.

Q. What was Ms. Najera's response to your suggestion?

A. As I stated, she told me to prepare a new memo containing only the statements of Detective Walls and to omit all other information contained in my memos.

Q. What was your response to that?

A. I told her I didn't believe that was appropriate. I told her I believe the appropriate course was to redact or black out the objectional – not necessarily the objectional part, but the portions of my memo that were clearly work product, and after redacting or blacking out those portions, to then turn over that portion to the defense in its present form so that the defense would clearly know that there had been some [122] redaction, and that would permit the defense to at some point later on request through the judge access or, at least, an in camera review of those redacted forms.

I don't believe creating a new memo altogether was appropriate because the defense would not – if we just gave the defense the new memo, they wouldn't have had any idea that there was other information that was contained in the original memos or that there was even original memos. They would believe that this new memo was the only document prepared in the course of this case.

Q. What was Ms. Najera's response to that suggestion?

A. She told me I was wrong and ordered me, again, to prepare a new memo.

Q. What was your response there?

A. I basically said the same thing, and we want [sic] back and forth. I told her I didn't believe it was ethical for me to do as she suggested. She seemed to brush that aside and ordered me to prepare the new memo as she told me to, and I just flat out told her that I would not do that.

Q. Was there a resolution of this in any shape or form?

A. She told me that she would make contact with

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[124] that you had been subpoenaed, and the time of the actual hearing?

A. Few days, maybe about three or four days before the hearing, she called me into her office. She began discussing the case again. She began to once again restate her opinion that what had occurred in this case was simply an innocent mistake, and that she didn't understand why I was still the position that these deputies had lied, had deliberately lied on the search warrant.

And she asked me to once again restate my basis for my opinion. I explained to her – again, I restated the basis for my opinion. We went backwards – no, we didn't go backwards. We went back and forth. It just was clear that we were going in a circle.

I finally told her, "Carol, you have your opinion; I have mine. But you need to know that if I'm asked my opinion when I'm up on the stand about what I believe happened in this case, I will state that I believe these deputies lied on this warrant." And when I told her that, she kind of leaned forward in her chair, and she was sitting at her desk. She just kind of was shaking her head from side to side and she said, "You know, if you keep thinking like that, talking like that, you're going to get yourself in trouble with this [125] office."

Q. What was your response to that?

A. I didn't respond. I just kind of sat there, and I just kind of looked at her, and I think if anything, I shrugged my shoulders and said. "Is that it?" And I walked out.

Q. What prompted this meeting?

A. She called me into her office for something.

Q. Specifically to discuss this case?

A. I don't know if we discussed other things before we discussed this case, but the majority of our conversation was this case.

Q. How did you perceive her comment to you about you possibly getting in trouble with the office?

A. I perceived it as a threat. I perceived it as an attempt not only to dissuade me from testifying as I stated that I would testify if I were asked for my opinion as to the whether or not these deputies lied, but I took that simply as a threat, Don't say what you're telling me you're going to say. Because if you do say that, there's going to be retaliation. We will retaliate against you, this office rather. This office will retaliate against you.

Q. Did what she have to say persuade you in any way?

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[130] Q. Prior to your testimony in the motion to traverse in the Cuskey matter, did you make the decision that you were going to be truthful, or were you still waffling at the time because of statements that allegedly were made by Ms. Najera?

MR. BECERRA: Objection. Vague and ambiguous. Misstates his testimony.

THE WITNESS: I think I – from the time she made those statements to me, I was vacillating back and forth about what I would do. Maybe the day before, if not

the day of the hearing, I finally told myself that regardless of the consequences, I was going to tell the truth.

Q. BY MS. LEE: Other than Mr. Grosbard, did you advise anybody else, or discuss with anybody else, the conversation that you had with Ms. Najera wherein she allegedly made the threat to you?

MR. BECERRA: Objection to the extent it calls for attorney/client privileged information.

THE WITNESS: You're talking up until the time of the hearing?

Q. BY MS. LEE: Right.

A. No, I don't believe I did.

Q. The motion to traverse was before Judge Milton, correct?

A. Yes.

[131] Q. And that was the judge that you had been assigned the calendar deputy?

A. Yes.

Q. And at the time of the motion to traverse hearing, you were still his calendar deputy?

A. Yes.

Q. What was your relationship with Judge Milton?

A. Professional.

Q. Same mutual respect?

MR. BECERRA: Objection. Calls for speculation. Calls for conclusion.

THE WITNESS: I don't know what he thought of me. I mean, I thought of him as a prosecutor-turned judge. He was a good judge for the prosecution.

Q. BY MS. LEE: Did you ever go out to lunch with him, have any social conversations with him?

A. I think we may have – we may have gone to lunch as a group with the court staff for birthdays, maybe even like a Christmas lunch, but it was always with a group. I mean, with other court staff, other public defenders, maybe even other D.A.s. We never went anywhere one on one.

Q. Prior to this motion, did you respect him?

A. That's a tough question. I gave him the respect that he was due, given his position. I didn't know him

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[134] him and you formed the opinion you should not win on the merits, but you ended up winning anyway?

A. No.

Q. So you were truthful in your testimony in the motion to traverse?

A. Yes.

Q. What was the ruling of the court?

A. I wasn't present during the ruling. I just found out afterwards that he had denied the motion to traverse.

Q. What was the ultimate disposition of the Cuskey case?

A. I don't know, because I didn't have it. I believe one defendant went to trial and was convicted. Although, I think he was placed on probation. I don't think he went to jail, and I believe the other defendant pled guilty, but to what, and what the disposition was, I don't know.

Q. Do you know which defendant was Mr. Escobedo's?

A. Escobedo.

Q. Escobedo's client?

A. No, I don't remember.

Q. So you don't know if his client actually went to trial or was convicted or he had pled guilty?

A. I don't know. I didn't have anything to do with [135] it.

Q. During the hearing before Judge Milton, is it your opinion that Judge Milton made any inappropriate comments or statements?

MR. BECERRA: Objection. Calls for a conclusion.

THE WITNESS: Not when I was present in the courtroom on the stand, but I was excluded during the majority of the hearing.

Q. BY MS. LEE: Just during your rendering of the testimony.

A. I don't think he even said anything, if he did.

Q. Do you know what evidence was presented by the defense in support of their motion to traverse, other than yourself?

A. No.

Q. So you don't know who testified and what testimony was given in relationship to the motion to traverse, other than your own testimony?

A. I know the other deputies were there, Deputies Simpkins, Spitulski, and Detective Walls, but what they said on the stand and who put them up there and what they asked them, I don't know.

Q. I think we started with a list of the events or conduct that you perceived to be retaliatory by Mr. Sunstedt as well as Ms. Najera. I think we left off [136] with Mr. Sunstedt, the comment that he made to you shortly after the March 9 meeting that you would no longer be a calendar deputy.

A. Right.

Q. Did he indicate when that position would end?

A. No, he didn't. He kept it kind of open because of – apparently there was a – well, this consolidation of the master courts was going to occur in April, and there was somebody transferring in – maybe transferring out. I forget which. That it wasn't going to happen until sometime after the consolidation was up and running.

Q. So to – I'm sorry. Were you going to –

A. I'm done.

Q. To your knowledge, were you the only one who was advised prior to the consolidation that you would no longer be a calendar deputy?

A. Of the four calender deputies?

Q. Correct.

A. Yes, I was the only one.

Q. So prior to the consolidation, there were four calendar deputies?

A. Yes.

Q. And of those four calendar deputies, what grades were they?

[137] A. Two of them were Grade 4s and myself, and another individual, Grade 3.

Q. And after the consolidation, how many calendar deputies remained?

A. You still had four.

Q. Four calender deputies?

A. But two calendar deputies per courtroom.

Q. So the same calendar deputies after consolidation?

A. Initially, yes.

Q. And which courtroom were you assigned to?

A. To Department N, as in Nancy, which would be Judge Hunt, H-u-n-t.

Q. And that's, I think, what you classified as like a backup calendar deputy?

A. Yeah, the Grade 4 was your primary deputy. The Grade 3 was – I wouldn't say backup calendar deputy, because each calendar deputy operated differently, but clearly the Grade 3 is junior to the Grade 4.

Q. And who was your senior calendar deputy?

A. Michael Grosbard.

Q. And who were the other two calendar deputies after the consolidation?

A. Deborah Passow, who was a Grade 4, and Donald Clem, who was a Grade 3.

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[139] Q. And did that other Grade 3 calendar deputy also become a trial deputy?

A. No. Donald Clem remained as a calendar deputy.

Q. So at the time that you left Pomona for your new assignment in El Monte, I think you said it was August or September –

A. Yes.

Q. – 2000, Donald Clem was still a calendar deputy in Pomona?

A. I know at some point Donald Clem was actually transferred to another bureau. I believe he went to either auto insurance fraud or – he went to one of the fraud units, but the person that took over for Donald Clem was another Grade 3, and her name was Amy Kuhner, K-u-h-n-e-r.

Although, I know she just got married, and she changed her last name. I don't have any idea what her last name is.

Q. When you became a trial deputy, was there somebody who replaced you as a calendar deputy in – I think you said in Department N?

A. Yes.

Q. And who was it?

A. Kathy Cady, C-a-d-y.

Q. Was she a Grade 3?

A. Yes.

[140] Q. Other than reduced – I guess the – I don't know if you would call it that because you said there were four calendar deputies before the consolidation and there were four calendar deputies after the consolidation?

A. Right.

Q. Was there anything that changed once the consolidation occurred at the Pomona branch with regards to the D.A.'s office?

MR. BECERRA: Objection. Lack of foundation.

THE WITNESS: With respect to the entire Pomona D.A.'s office.

Q. BY MS. LEE: Yes, the Pomona D.A.'s office in terms of – when you had that subtle change where I think before the consolidation you had four calendar deputies at four different departments.

A. Right.

Q. And then after the consolidation, you had two calendar deputies in two departments.

A. Correct.

Q. Any other changes in the D.A.'s office after the consolidation?

A. Well, the consolidation, I mean, affected everyone, because instead of staffing four courts with trial deputies, you're now staffing two courts with trial [141] deputies, so your trial deputy pool has doubled in size, if you will, but so did your case loads. Whereas before, you weren't – the calendar courts weren't concerned with what we call municipal matters, felony arraignments, preliminary hearings, but after the consolidation, those calendar courts became responsible for those matters, not only the initial official felony arraignment, but the preliminary hearings.

The calendar – consolidated calendar courts pretty much started everything off from the time of filing to the time of trial.

Q. What was the next retaliatory conduct by Mr. Sunstedt?

A. Well, I'm not sure if it was his decision or Defendant Najera's decision, but I had a murder case that I had been assigned probably – if not late 2000, maybe early 2001 – not 2001. If not late 1999, then early 2000. I think it had to be – I'm not exactly sure when it happened.

I remember Defendant Najera came to my office and asked me if I had any open murder cases. I informed her I had this one. I can't remember the defendant's name right now. She told me that they were looking to give murder

cases to the Grade 2 deputies, and if I had any cases, any murder cases, that they could handle.

[142] I told her I had the one. She inquired what it was about. I told her the basic factual scenario, and I believe she inquired as to whether or not she thought a Grade 2 could handle it. I don't know if she mentioned the name in particular, or just said, can a Grade 2 handle it?

And I remember saying that it would pose a problem for some – a Grade 2 that didn't have a murder case because it was a murder based upon an implied malice theory, which is a difficult theory for judges, let alone juries to understand, that it takes some time for a prosecutor to understand it so they could explain it to the jury, and I don't think it was a good case to give someone that had no murder experiences.

Even though I explained that to her, she went ahead and took the case and reassigned it to the other D.A.

Q. Did she tell you why she was looking for a murder case for a Grade 2?

A. Just that they were looking to give it to Grade 2s for experience, I would assume.

Q. Do you know which Grade 2 she was referring to?

A. When she initially asked for the file, I don't believe she mentioned names, but I'm not positive, but I know who it eventually went to, and that was [143] Steve Gallon.

Q. Was it your understanding that you were the only one that she approached with regards to a murder case?

A. To take the murder case and give it to someone else?

Q. Right, to a Grade 2.

A. Yes. That was my understanding; I was the only one.

Q. And to your knowledge, you were the only one during that time who Ms. Najera took a murder case away from to give to a Grade 2?

A. Yes.

Q. Was there anything else about the case, the murder case that was reassigned to the Grade 2, that you believed was inappropriate to be tried or handled by a Grade 2?

A. Other than the fact that it was too complicated for a Grade 2 deputy with no murder experience to try, no.

Q. I guess my question more so is: Other than the malice theory that you mentioned, was there anything else about that case that was complex such that it just wasn't appropriate for a Grade 2 to try?

A. It was a murder case that every single witness, including the victim, was involved in either the use of [144] or involved in the sales of methamphetamine.

It was a case where the victim was murdered probably in view of maybe five or six people. All those people told different stories. Some of those people were involved in disposing evidence after the murder. One of the witnesses had been given immunity for his testimony, and even after given immunity, still was not telling the complete and total truth.

It was going to be a murder case where none of the witnesses, with the exception of the police officers, none of the witnesses were going to be cooperative, were going to tell the complete truth. It was a case where you would have to what we call green the witnesses and basically get in their face and argue to a jury that, "Ladies and gentlemen, all these witnesses are going to lie to you in one way or the other, but the truth will be that this defendant committed murder." That takes some experience to do.

And it takes not only time in the office, but having a background from doing murder cases where not only can you make that argument, but then you have to make the leap into why it's an implied malice murder, and that takes some time.

Q. And up to that point, had you actually greened any witnesses on this case?

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[146] for a conclusion.

THE WITNESS: Steve is a good lawyer for the level of experience that he had at the time. He did a lot of trials. I believe he got some favorable verdicts, but he was still learning, and I could see that in supervising him, and, yes, if I was told beforehand that they were going to give it to him, I would have said, "Look for another murder case to give him. This is not the type of case to give him." He was not ready for that type of case.

Q. BY MS. LEE: The fact that a murder case was taken from you to be reassigned to another deputy D.A., did that adversely impact you?

A. Our ability to be promoted in the office depends to a certain extent on the number of murder cases that you try. Obviously, the more murder cases you try, you stand a better potential of being promoted, so it is very important for a D.A. to try as many murder cases as possible.

So by taking the murder case away from me, they were taking that potential for me to promote, and by not assigning any new murder cases to me, that also prevented my ability to promote.

Q. But that's not an uncommon thing at the D.A.'s office, is it, which is to take murder cases from one [147] prosecutor and assign them to somebody else?

MR. BECERRA: Objection. Lack of foundation. Incomplete hypothetical.

THE WITNESS: Actually, I think it is. I think it is.

Q. BY MS. LEE: So you haven't heard of a situation prior to your own experience where the D.A.'s office took a murder case from one prosecutor and gave it to another prosecutor?

MR. BECERRA: Objection. Argumentative as to form.

THE WITNESS: Not against – not without the prosecutor's consent. I mean, I've taken over murder cases because somebody is either being transferred or they're so bogged down in other work that they simply can't try it, but never have I either received a case or had a case taken from me just to give to somebody else for more experience.

Q. BY MS. LEE: So you never heard of a situation in the D.A.'s office where you may have a Grade 2 who is about to go to Juvie or another assignment and wanting to give them murder trial experience before they left?

A. Not involving taking the murder case from another D.A., no. Maybe giving one that just started, but not taking one from another D.A.

Q. What is the next retaliatory event or conduct by [148] Ms. Najera or Mr. Sunstedt that you recall?

A. Aside from taking the murder case, they didn't assign me any new murder cases.

Q. By the way, approximately when was this when Ms. Najera took the murder case away from you?

A. I don't remember. It would have been – I don't know if it was before the hearing or after the hearing. I just I don't remember.

Q. Was this when you were still a calendar deputy or trial deputy?

A. I think I was still a calendar deputy, but calendar deputies were permitted to carry murder cases.

Q. And how many murder cases did you have at the time?

A. I think that was the only one that I was carrying.

Q. While you were at the Pomona office, how many new murder cases would you be assigned on, let's say, a given year?

A. You know, it just depended on the murder rate in Pomona, and I don't know what the murder rate was back then.

Q. Were you aware of lots of murder cases being filed during that time?

MR. BECERRA: Objection. Vague and ambiguous.

[149] THE WITNESS: I don't know.

Q. BY MS. LEE: So you don't know if the reason why you weren't being assigned any new murder cases wasn't because there weren't enough to go around versus you weren't being assigned because it was in retaliation?

A. I know there were other murder cases being assigned, were being assigned to other D.A.S.

Q. How many murder cases?

A. I don't have the number. I don't know.

Q. Do you recall which new murder cases were being assigned to which deputy D.A.?

A. No.

Q. How did you become aware of these?

A. Just from working in the office.

Q. Did you bring that to somebody's attention?

A. No.

Q. Did you ever question why it was that you weren't being assigned new murder cases?

A. I questioned myself. I may have raised it with some other deputies, but I never questioned Defendant Najera or Sunstedt.

Q. When was the last time you were assigned a new murder case before leaving the Pomona branch?

A. It would have been the case that was given to Steve Gallon. That was the last one, and that would have [150] been – I believe the murder was in 1999.

Q. And when was that trial set for; do you recall?

A. That had many settings. I don't think we – I don't think we did the prelim until maybe late 1999, maybe early 2000, so it was still – it may have been in the pre-trial stage. I'm not positive. I don't know when it was actually set for trial.

Q. At the time that that murder case was taken from you, were you aware of any other murder cases pending that would have been more appropriate for a Grade 2?

A. No, I wasn't aware of any of the murder cases floating around.

Q. What's the next incident or event of retaliatory conduct by Ms. Najera or Mr. Sunstedt?

A. It probably would have been the denial of the promotion to Grade 4.

Q. When did you apply for the promotion?

A. I believe they had the test sometime in 1999, maybe November, October 1999. It took them awhile to grade it, and I think the first – maybe the first list came out, in terms of what band you're in, sometime early 2000.

Q. How did you do?

A. I did well. I was Band 1.

Q. Was this a written test?

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[156] Q. Do you know their names?

A. Manny Garcia, Kathy Cady, Don Clem – I can't think of the name of the other person.

Q. Do you believe that you were more qualified for the Grade 4 promotion than any of the other four that were promoted?

A. Yes.

Q. Who?

A. Don Clem and the other name of the person I can't remember. I know it's a female. I can't think of her name.

Q. Why do you say that?

A. I'd been in the office longer and had more experience. I think it's – to the female, I don't think she's ever been a calendar deputy. I don't think she had anywhere close to the number of trials I had done.

Q. Other than the number of trials and being a calendar deputy, is there anything else that classifies more experience?

A. Well, I had also worked in the special unit, which is a class, and I also was then and still am, an instructor

Q. At the time that you received your scoring, how many trials had you done, had you completed?

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[159] A. It's a – I think initially it's about $10,000, but it does go up from that. I think top-step Grade 4 is maybe 130-, 140-.

Q. What were you making at the time that the list of promotions came out on August 25, 2000?

A. When the first list came out, or the first score, or when the promotion list came out?

Q. The promotion list of August 25, 2000.

A. I believe at the time I was probably – I believe I was maybe at 8,500 a month.

Q. You've gotten a raise since then?

A. It's a step raise. You get a raise every year.

Q. What do you currently make?

A. It might be – you know, I don't know. I think it's maybe 88-, maybe 9,000, but I'm not positive.

Q. Do you know what weight the written exam and the appraisal and promotability have compared to the evaluation that's done by the committee?

A. Well, the appraisal and promotability and the exam gets you one place. It gets you into the band, which is the list of potential promotees, if you will.

Once you get into that list or that band, then all that

within Band 1 that were eligible for [160] promotion; if not more.

Q. So it doesn't matter what your scores were then?

A. No, not at all.

Q. Would it be accurate to say that once you're in Band 1, it's a subjective criteria?

A. It is completely subjective once you're in Band 1.

Q. Do you go through interviews?

A. No, no.

Q. So it's really subjective based upon who happens to be sitting on the evaluation committee?

A. It's not only who's sitting, it's who is talking to the evaluation committee and what they're saying about a particular D.A. and whether or not that D.A. should be promoted or not.

Q. Do you know the specific names of individuals who were on the evaluation committee at the time that the August 25, 2000, promotion list came out?

A. I tried to find out during the grievance proceeding, and the office wouldn't tell me. I'm assuming it would be Gil Garcetti as one of them since he makes the final call. Other than that, I don't know.

Q. Prior to the August 25, 2000, promotion list coming out, were you aware of any comments made by Ms. Najera or Mr. Sunstedt to anyone on the evaluation [161] committee that may have affected your promotability?

A. I know that a week or a few weeks before the August 25th promotion that there was a phone call or some – maybe a series of phone calls – between the Downtown committee, I would assume, but dealing with the Grade 4, and Defendant Najera and Defendant Sunstedt, about who should be promoted or who they were pushing to be promoted. But in term of details of what was said, I don't know.

Q. How do you know that there was this discussion?

A. Somebody told me that Defendant Najera had told – I'm not sure if it was a he or a she – had told them that she had received, or that she and Frank had received, a phone call from the committee regarding who should be promoted and who shouldn't, and basically had these three or four choices on who to push for the promotion.

Q. You don't know the individual who gave you this information?

A. No.

Q. Male or female?

A. I believe it was a male, but I'm not positive.

Q. Another prosecutor or just a clerical person?

A. No, it was a prosecutor.

Q. Grade 3, Grade 4?

[162] A. No.

Q. Is there anything that you could look at or review that could refresh your recollection about who this person was?

A. I'd have to talk to people there in Pomona and ask them, "Did you tell me this?"

Q. Was this information conveyed to you only or in a group setting?

A. No. It was just conveyed to me through a phone conversation.

Q. In the context of, "Oh, by the way, the committee has contacted Carol Najera and Frank Sunstedt"?

A. Yeah, more or less.

Q. Do you know the names of the Grade 4s in the Pomona branch that were not promoted?

A. You mean the Grade 3s who weren't promoted to Grade 4s?

Q. Right. I'm getting confused. Do you know the name of the Grade 3s in the Pomona branch who applied for and did not receive the Grade 4 promotion who were in Band 1, other than you?

A. Chrissy Weiss, Margaret Moe, Ed Miller. Those are the only names that are coming to mind right now.

Q. Of those people that you mentioned, do you believe you were more qualified than any of them for the [163] Grade 4 promotion?

A. I had more experience than they did, yes.

Q. Again, by more experience? You mean based upon the number of felony trials that you had conducted and you were a calendar deputy and in your special units that had been assigned to you?

A. And also being an instructor for college, yes.

Q. So is there a recourse that a prosecutor can take once he or she is advised that she had been denied a promotion?

A. Other than, perhaps, Civil Service Commission.

Q. Within the D.A.'s office?

A. No. The Civil Service Commission is not within the D.A.'s office; it's separate and apart. I don't think there's anything within the D.A.'s office for dealing with promotions. In fact, I know there isn't because when I wanted to make it a part of the grievance – I'm not sure if it was Director George Knoke or Steven Sowders, S-o-w-d-a-r-s, who informed me that that would be a non-issue; we wouldn't even consider that.

Q. So you could not file a grievance with the Civil Service Commission with regards to the denial of your promotion?

A. No. I could do that with Civil Service

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[169] those cases once that warning comes out, if you will.

I think I also asked for the case involving these defendants, and specifically involving these deputies, be referred to and investigated by the office of Special Investigations Division, which at that time was the unit responsible for handling cases involving police officers.

I also requested that the matter with respect to Carol Najera's attempt to dissuade me as a witness be referred to the Attorney General's office for review. I asked that my

transfer to El Monte be rescinded, and I asked for the promotion.

Q. Why did you ask for some sort of implementation policy with the D.A.'s office regarding police misconduct?

A. Well, because of this case. Clearly we needed a policy. I remember one time – and I'm not sure whether I had a conversation when this was all happening with Frank Sunstedt, and I remember making the inquiry, "What do we do next? What's the next step?" And I remember his response was, "You know, I got to tell you, Richard, in my 25-plus years with this office, I've never come across this. I don't know what to do. I'm just kind of, you know, going as it comes to me."

So it was clear that we needed a policy on how [170] to deal with these cases; what D.A.s are supposed to do; who are they supposed to alert; what role the office takes; what is done with that information; if there's an investigation, what happens with the pending case. But also to ensure that D.A.s are encouraged to report cases – or report officers they suspect are being involved in wrongdoing; that the supervisors are not to take any action which would discourage that reporting; that the supervisors are also to take action when it appears that any law enforcement agency or official is attempting to intimidate a prosecutor from reporting the same.

Q. To your knowledge, prior to this incident with the Cuskey case, had there been any similar occasion where you had a prosecutor raise an issue of police misconduct within the D.A.'s office?

A. Sure. I think probably one that everyone knows about is the one with Rafael Perez. The D.A. raised the issue with him way back in 1995, 1996.

Q. Other than the Rafael Perez, which deals with the L.A.P.D., I'm talking about specifically with the people that you've worked for within the D.A.'s office. Any D.A. that you're aware of in your years at the D.A.'s office prior to the Cuskey incident, have you heard about a specific prosecutor bringing to the D.A.'s office the [171] same or similar kind of allegations relating to police misconduct?

A. Sure. I think that happens quite a bit.

Q. Can you name some prosecutors' names?

A. No. I mean, it's just things that you hear over the years that the D.A. suspects this cop is lying, but that would be, you know, the extent of my knowledge, in terms of, okay, so they informed somebody, and that was it.

Q. You just never knew what happened after that?

A. No, and I've never followed up with that. It was more small talk among prosecutors that other prosecutors have come across situations where they were in a situation where they believed a police officer lied or maybe planted evidence or committed some other form of misconduct, and they were taking action, but I never followed up as to what the result of the action was.

Q. But you mentioned that Mr. Sunstedt indicated to you that this type of stuff hadn't ever happened before, and your incident was kind of a novel issue.

A. Well, that's what he said.

MR. BECERRA: Let me object. Argumentative as to the form, and I don't believe there's a question pending.

Q. BY MS. LEE: There is.

A. Well, that's what he said. I wouldn't say I [172] necessarily believed him when he said that.

Q. So you didn't believe him when he said that?

A. I was surprised that somebody who had been in the office that long could honestly say that he's never been confronted with an issue of a police officer, or an allegation of a police officer, lying in a case. I mean, if he honestly believed that, then either he is completely incompetent, or he's just flat out lying.

Q. The other thing that you had mentioned in terms of what you wanted out of the grievance was that you wanted the retaliation by the defendants to cease.

What specific retaliation was still ongoing at the time you filed your grievance by the defendants?

A. I was in the El Monte area.

Q. So you wanted the reassignment – strike that. You wanted out of El Monte?

A. I wanted to go back to where I was working before any of this happened. I wanted to go back to an environment where I wasn't looked upon by the defendants as almost like a leper, if you will.

Q. So then you wanted the defendants to change their reaction when they saw you?

A. I didn't want the defendants to treat me as if I had done anything wrong. I wanted the defendants to realize what they had done was wrong. What I did was the

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[177] anybody else?

A. No. I asked him to interview three witnesses: the judge, Judge Milton; the court reporter, Sharon Fox; and one of the defense attorneys; and he didn't interview any of them.

Q. Did anybody else from the D.A.'s office testify during your grievance?

A. The only one that testified was Steven Gallon.

Q. Did he testify on your behalf?

A. I don't know if I called him on my behalf. I called him as a witness.

Q. So actually Mr. Knoke's denial was based upon a lack of sufficient evidence?

MR. BECERRA: Objection. Calls for speculation. Calls for conclusion.

THE WITNESS: No. I think he denied it because Gil Garcetti told him to deny it.

Q. BY MS. LEE: Why do you think that?

A. Because I think Gil Garcetti was going to do whatever it took to protect Frank Sunstedt, and to a lesser extent, Carol Najera.

Q. Other than your personal beliefs, do you have any other facts, evidence, to support your belief?

MR. BECERRA: Objection. Misstates –

THE WITNESS: That Gil Garcetti played a role in [178] denying?

Q. BY MS. LEE: Right, that Gil Garcetti instructed Mr. Knoke to deny your claim.

A. About two days before I was informed that the grievance was denied, I spoke up before the board of the Mexican-American Bar Association in Downtown, and at that meeting, I essentially told them my experiences about what was going on in this case and with the defendants, and that something needed to be done, and that the bar association needed to make contact with Gil Garcetti to ask him to become personally involved in the case, and to look into the matter as well as to immediately adopt a policy on how to handle cases where prosecutors suspect a police officer engaged in misconduct.

Q. This was an open meeting?

A. It was – I don't know if it was open. It was before their board. I don't know if you called it the board of trustees. It was before a board of probably about a dozen people.

Q. And this was – your grievance was denied on October 5th, and you said this was about two days beforehand –

A. Right.

Q. – So that would make it October 3rd?

A. Right.

* * *

[180] He said that was fine, and basically, "I'm going to put you on the agenda to speak before the board." About an hour or two after that, I received a phone call from James Blancarte, B-l-a-n-c-a-r-t-e, who was the president of MABA at that time, land he told me that he'd received a phone call from Luis Rodriguez, and he wanted to get my version of what had occurred.

He wanted to make sure I was not a Cooley supporter, and that I was not going there for political reasons, and so I told him what had occurred, and he said, "Okay. I know Garcetti – " this is him telling me. "I know Garcetti. Do you mind if I try to personally intervene on your behalf with Garcetti and see if we can resolve the situation without the need for you to appear before the board?" And I told him that would be fine, and he said he would get back in touch with me.

Q. So you had the discussion with Luis Rodriguez before October 3rd about you wanting to go before the board about your issues at the D.A.'s office?

A. I'm not sure I wanted to go before – he asked if I would go before the board. I wasn't actually crazy about it, but I decided I would do it.

Q. Is that something that MABA considers, employment type of grievances?

MR. BECERRA: Let me object. Lack of foundation.

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[186] endorsement from MABA for whatever political office or seat, and I guess this issue concerning endorsing Garcetti came up.

Q. When you say "this issue," are you talking about your issue?

A. Well, from what Luis explained to me, I was going to speak just before the MABA board voted on whether or not they were going to continue to endorse Garcetti.

Q. Did you, in fact, speak before the board voted?

A. Yes.

Q. What did you say?

A. Well, not before James Blancarte called me out of the board room and explained to me that he had actually spoken to Gil Garcetti, and Gil Garcetti had told him that he was, in fact, aware of the case, and that he would become more personally involved in the case. In fact, that he would look at it again first thing in the morning, and that he would – the way Blancarte related to me was that he would give it his highest priority, and that I had nothing to worry about, and that I could go, and I didn't have to speak before the board.

Q. When Mr. Blancarte said "the case," "aware of the case," did you perceive that as being the People v.

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[190] October 3rd meeting, was recorded?

A. I don't know. I don't know how formal those meetings are.

Q. Did you see anybody taking notes or typing, like a court reporter?

A. There wasn't a court reporter there. I don't know. I'm assuming they have like a secretary and a treasurer, but I don't know who those people are.

Q. Going back quickly to your grievance, you requested Mr. Knoke to interview certain people that he apparently did not do?

A. Right.

Q. Judge Milton was one of them?

A. Correct.

Q. Why did you want him to interview Judge Milton?

A. Either before I filed my grievance or shortly thereafter, I called Judge Milton, and I asked him if he recalled the hearing in the case, and specifically if he recalled the way Defendant Najera treated me while I was on the witness stand, and he said he did, and he said he found her conduct to be very – I remember I wrote it down, and I actually gave that to George Knoke – that her conduct was very chastising, rude, and hostile towards me while I was in the witness stand.

Q. Did he indicate to you that her conduct in any

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[220] Q. How about Frank Sunstedt? How would you describe your relationship with him before this incident?

A. Good.

Q. Had you been intimidated – well, let me ask you, are you intimidated by him today?

A. I haven't seen him since September.

Q. Have you ever been intimidated by him?

A. Yeah, I think when I – that day after the meeting with the sheriff's department when I questioned his lack of ethics and what he was doing. You could say I was intimidated by the look he gave me.

Q. Any other instances of how you were intimidated by conduct or by anything that Mr. Sunstedt had said?

A. Well, beginning in June or July when he began his silent treatment, when he wouldn't talk to me. I do recall there was one occasion when I walked out of one office, and I think it was – I'm not sure if it was my office. I think somebody else's office, and he walked out of a kitchen, and we basically came face to face and probably within more than a foot of each other, and we just locked eyes and just stood there staring, or he was staring at me. I guess I was staring at him, and we just stood there not saying a word.

Q. That intimidated you?

A. Yeah.

* * *

[249] Q. BY MS. LEE: Was it from a source other than your attorneys?

A. No.

Q. When did you become aware of that information?

A. In October of last year.

Q. How do you know that Mr. Sunstedt actually had knowledge of these allegations?

MR. BECERRA: Objection. Vague and ambiguous as to which allegations.

MS. LEE: The allegations that – the subsequent allegations made against these two deputies.

MR. BECERRA: Okay, so to the extent, again, that you're not asking anything that he got from his attorneys.

THE WITNESS: Well, the letter was addressed to Frank Sunstedt. It was mailed there to the Pomona branch, and then once I became aware of it and realized the case was still ongoing with – not the Cuskey defendants, but the other defendant, I faxed a copy of my memos to that defense attorney and advised him that there had been prior allegations involving the same deputies, and that pursuant to Brady, he needed to be aware of them.

Q. BY MS. LEE: What is this attorney's name?

A. His name is – it's not the attorney – not the [250] attorney – it's another attorney.

Q. Do you know the name of the criminal case of this attorney?

A. No, but I can find out. He's one of the local panel lawyers there in Pomona, and –

Q. It's just escaping you right now?

A. I can visualize his face right now.

Q. If you heard it again, you'd remember?

A. I would remember.

Q. So even though you weren't involved in the Cuskey matter, it wasn't your case, you thought it was still your obligation to hand over Brady material?

A. Well, I believed it was the obligation of the district attorney's office, in particular, the defendant, but it was clear that they were not going to abide by that obligation, so I took it upon myself, yes.

Q. Did you receive any type of response from the D.A.'s office to this action that you took?

A. Yes, I received a call from Director George Knoke who basically warned me that if I provided Brady discovery, such as my memo, to a defense attorney, that the police officers could sue me.

Q. Do you know what prompted this call from George Knoke?

A. He indicated that he had spoken to

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[262] A. I have no idea. I don't want to know.

Q. What about noneconomic damages that you're claiming?

A. Okay. Probably – not probably. You know, up until this incident happened, I had really enjoyed my job as a D.A. I knew going into law school I wanted to be a D.A. I think I even knew through college I wanted to be a D.A., and up until this incident, I enjoyed it. I enjoyed my job. Talking to other friends who I'd gone to law school with who are in civil practice – and no offense to you – they just would always complain about their job. They never – they didn't seem to like it, never enjoyed it, and I always had

the ability to tell them how fun my job was and how much I enjoyed it.

Yeah, there's days where you get tired of some of the stuff and wanted to get away from it, especially when I worked sex crimes. You just got tired of hearing about, you know, this station and that station, but overall, I enjoyed what I did. I felt I was doing the right thing. I felt I was doing a good thing. I felt I was doing a good thing putting the so-called bad guys away.

But I think that changed when this incident happened. Because up until then, I had always thought I had done the right thing. I had always thought that [263] everyone – all my superiors had done the right thing. I had never questioned the motives or ethics of anything I had done or anything my superiors had done, but this case kind of turned that, if you will, around, you know, and it made me really question being a D.A. It made me question whether I wanted to remain in the office.

There were times I really thought about quitting because of what they were doing to me. It just didn't seem worth it. It didn't seem to be the honorable thing to do because I felt – I remember the day of the motion leaving the office after testifying and just feeling like I was – that I was now like the defendants I had prosecuted, and I just was sick to my stomach. I couldn't eat. I couldn't – I had trouble sleeping, and I – it really got to the point where I really didn't want to go to work. I didn't want to deal with them. I didn't want to deal with this entire situation.

I just – I didn't feel right about what I was doing, and it made it more difficult to continue to handle other cases even though I knew this case was still around. Even though I didn't have it, even though it was no longer

assigned to me, I was still aware that this injustice was still happening, and I couldn't do anything about it.

And any time I tried to do something about it, I [264] had to face them, and I had to deal with them, and it just made me really think about what it meant to be a D.A.

Q. Well, let me try to break that down. I mean, what I'm trying to get at here is I assume this is your claim for emotional damages – you're making a claim for emotional damages?

A. I guess I am.

Q. Did you sustain some emotional damage as a result of the defendants' conduct?

A. Yes.

Q. You mentioned a few things. One was that you felt that you wanted to quit a couple of times?

A. Yes.

Q. When was the last time you wanted to – when was the last time you had that feeling?

A. Probably the day I was told by George Knoke that my motion was not – the motion – the grievance was denied – no. When he contacted me and basically warned me, "Don't provide Brady material to the defense because the police may sue you."

Q. Approximately when was that?

A. It would have been sometime in October, possibly November of last year.

Q. I'm talking specifically with regard to the [265] defendants in this case.

A. Uh-huh.

Q. When was the last time you felt you wanted to quit as a result of something that any of the defendants did in this case?

A. Well, when the grievance was denied.

Q. And that was on October 5th, 2000?

A. Right.

Q. That's when you were notified that the grievance was denied?

A. Correct.

Q. So that was the last time that you wanted to quit?

A. That's the – when I thought about it, yes.

Q. And up to that point, how many times have you wanted to quit?

A. I'm not sure I can even put a number on the number of times I thought about it. I mean, it was – you know, at times it was almost like a daily thought.

Q. What prevented you from quitting?

A. I don't know. Maybe hope that they would change, maybe the hope that there would be a change of administration, and that would affect it.

Q. There has been a change of administration, correct?

[266] A. Yes.

Q. Has that given you more hope, made you feel a little better about your job?

A. I think it did initially. I think there was a bit of a setback about two months ago, a month and a half ago. Actually even longer than that, in which I was set to go back to Pomona, and the head deputy there informed the deputy in charge of El Monte that he didn't think I should go back to Pomona because he didn't think law enforcement would approve of my going back.

Q. When was the change in administration?

A. I think he was sworn in December, first week of December. Actually, no, I want to take that back about when you asked me when I first – when I last thought of quitting.

I think when this recent event occurred with the head deputy, the new head deputy in Pomona, Richard Burns, where he told the deputy in charge that he didn't think I should go back and he told the other deputy in charge that I shouldn't file any cases involving Industry station and then he attempted to transfer me to Norwalk, I again thought about quitting. I was like, "This administration, it hasn't changed."

Q. Who did Richard Burns tell?

A. He told Terry White that he didn't think I

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[270] Huntington Park years ago.

Q. Any other damages that you're seeking?

A. You know, I would love to have my life the way it was before this all happened. I would love to have the

reputation I enjoyed with the D.A. before this all happened. My reputation has taken a hit. I mean, there are clearly D.A.s who won't talk to me anymore, won't deal with me.

Q. What is your understanding about the change in your reputation as a result of this incident?

A. There are people that obviously kind of whisper or talk about me behind my back concerning my motivation behind this.

Q. What do you mean "this"? Are you talking about the lawsuit?

A. The lawsuit, and even the grievance to a certain extent, but primary the lawsuit.

Q. What have you heard?

A. That I did it for Cooley's benefit, that I was somehow an instrument of Steve Cooley, and that I was doing all this simply in order to benefit Cooley's chance for election.

Q. Who have you heard make these statements?

A. Frank Sunstedt.

Q. Anybody else?

* * *

[273] obviously they're entitled to know what you're contending caused you damages, so you mentioned some things now, and so think about it, if you need to.

I'll throw something out there to jog your memory. Have you sought treatment as a result of any emotional distress that you've suffered?

A. No.

Q. Have you taken any medication?

A. No. Maybe I may have taken some sleeping pills, you know, over-the-counter sleeping pills.

Q. How long would you say the emotional distress lasted?

A. The nine months that this went on, from March through – well, through the grievance and filing of the lawsuit.

Q. Is this something that's continuing?

A. No. It tapered off, or it's stopped with the election. It started up again when Rich Burns made those statements to Terry White and Michelle Daniels, but after I spoke to John Allen, it stopped again.

Q. But is it your belief and understanding that either Garcetti, Sunstedt, or Najera had anything to do with the comments being made by Richard Burns about your transfer?

A. I don't know. I mean, it's clear that his

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[275] told me, basically kept coming to my defense, basically telling Defendant Najera, "No, he's a good prosecutor. He knows what he's doing," and Carol Najera basically kept criticizing my abilities.

Q. When was this?

A. This would have been before I filed my grievance, but exactly when, I don't remember.

Q. And Grosbard related this to you?

A. He related it to me, and he also wrote it out in letter form which was attached to my grievance.

Q. Do you believe that your abilities as a prosecutor has diminished in any way as a result of any conduct by the defendants?

A. My abilities?

Q. In other words, did anything that the defendants do cause strain or, you know, any strain to your prosec[u]torial abilities?

A. You know, I'm sure it got to the point where I simply stopped caring about what I was doing, and you know, it was never really a job before this, but it almost became a job after it. It was just something to go to just to make money, and I wasn't enjoying it any longer.

Q. And that was up to the point in time when you got transferred out of the El Monte office to Downtown, [276] or is that something you're still experiencing now?

A. No, no. I'm not experiencing it now.

Q. That was up until the time that you were transferred out of the El Monte office to Downtown?

A. Right.

Q. I'm talking specifically about do you believe that your abilities to perform your prosec[u]torial duties, your

abilities to be an effective prosecutor, to perform your obligation to the D.A.'s office, were diminished in any way as a result of the conduct of the defendants?

A. I think in order to really do the job properly, you have to kind of care about what you do, and I think because of what they did to me, I stopped caring about what I did, and I do think that has an impact on how we do our job.

Q. Can you think of any cases where you lost a motion, or you didn't handle something in the best way that you could attribute to this incident?

A. No, nothing comes to mind.

Q. Have you been reprimanded or verbally advised that something that you did was less than the standard required of the D.A.'s office?

A. No.

Q. The last thing I wanted to do was show you a document. It was provided to me by your counsel at the

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, Individually, and in his Official Capacity, FRANK SUNDSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually, and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 through 10, Inclusive, Defendants.	) No. CV 00-11106) (AHM) (AJWx)

DEPOSITION OF FRANK SUNDSTEDT, taken on behalf of the Plaintiff, at 3500 West Beverly Boulevard, Montebello, California, commencing at 10:22 a.m., on Wednesday, September 5, 2001, pursuant to Notice, before TERI E. GONTA, CSR NO. 10099, a Certified Shorthand Reporter in and for the County of Los Angeles, State of California.

* * *

[29] Q. Okay.

A. Up until that time, sure.

Q. Okay. Then we're talking pre Cuskey?

A. Yes.

Q. Okay. We'll get to Cuskey in a little bit.

A. Sure.

Q. Okay. At some point before Cuskey, do you have a recollection that Mr. Ceballos is actually made – and I'm not sure of the exact title – but actually a deputy in charge of the courtroom?

A. Yes.

Q. And what's the correct title?

A. Calendar deputy. I made him a calendar deputy.

Q. Okay. Now, what was the reason that you made him a calendar deputy?

A. There were – well, there were a couple of reasons. Richard was a Grade III. I didn't – a calendar deputy position is a position where a deputy D.A. is assigned to a direct calendar court, and there are two other deputies. If your staffing is – if you have the staffing, two other deputies assigned to that court to work under the calendar deputy. The calendar deputy is responsible for the processing of all criminal cases that are not specially assigned to [30] special unit people that are assigned to that calendar court. And so a calendar deputy's duties are to make sure that the cases are handled appropriately in that department. And I can't even remember now what your question was.

Q. Well, actually you saved me a couple questions. I was going to ask you what a calendar deputy was. You already answered that. I appreciate that. It sounds like that's a promotion.

A. Well, it certainly isn't any more pay. It is a – in the culture of the D.A.'s office, deputies that are trial deputies frequently want to be calendar deputies because they want it on their resumes for promotional purposes. And you have an opportunity to then supervise at a much, you know, lower level, but still assign lawsuits. And you have a lot of interaction with the head deputy as a calendar deputy so –

Q. And is a calendar deputy – is he allowed to select which cases he will try as distinguished from the people that he supervises?

A. You have – yes, as a calendar deputy, you have much more latitude in culling out, if you will, cases that you want to try and assigning other cases to other lawyers, yes.

[31] Q. Okay. And did you tell me why you selected him to be a calendar deputy?

A. Well, at the time I selected Richard to be a calendar deputy, I didn't have – I didn't have enough Grade IV's to supply a Grade IV calendar deputy to the four criminal departments. And point in fact, I only had, I believe, two Grade IV's and a number of Grade III positions, so that I would, as best I could, rotate assignments within my branch so that I could give everybody an opportunity to do calendar work. I would give everybody – although they didn't consider it an opportunity – a staffing assignment to file cases. So you – downtown would not help you with your staffing level. You got a staff, and you were told to manage your operation as best you see fit.

I recall discussing with Mr. Ceballos as calendar deputy at the time that I was considering putting him in

charge of the calendar, and I asked that calendar deputy whether he thought Richard was up to the task. He told me that he thought he was. I had not seen any evidence that he wasn't, and so I selected him as a calendar deputy.

Q. Okay. Was his performance as a trial deputy, was that part of what you took into

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[35] had some – you felt good about him as a deputy being in your office and working with you?

A. Yes.

Q. All right. You did evaluations – let me back up.

As part of your responsibilities, did you have to do employee evaluations of the deputies that were working with you at Pomona?

A. Correct.

Q. All right. And would you do that, be solely responsible for that, or would your assistant, Ms. Najera, also participate in those evaluations?

A. I believe I did them all for Grade III's, and Grade IV's, and I did ask Carol and her predecessor, I believe, to do the performance evaluations on the newer deputies. But I believe I did all of the performance evaluations for the Grade III and Grade IV deputy D.A.s.

Q. Okay. And when an evaluation is done of a deputy district attorney – and let's stick to a Grade III at this point – what is evaluated? What's the criterion in doing an evaluation?

A. Well, it's probably the – it's probably the least favorite job of a supervisor in the D.A.s office because they are the – you have to do

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[43] A. I do.

Q. Okay. And how is that scored?

Is that a number score, or is that a letter score?

A. I believe it was a letter score.

Q. Okay. And do you know what you gave him?

A. I believe I gave him either – and I think I rate him in seven or eight categories. I think I either gave him all A's or almost all A's and a B or something, but I certainly rated him so that he would be in the outstanding category.

Q. Okay. And your intent would have been that he be seriously considered for promotion to a Grade IV?

A. Well, I guess you would have to – well, to answer your question, yes, I think he was definitely a candidate. Amongst the whole there was going to be, you know, any number of – maybe as many as 150 candidates for the Grade IV position, and I think I rated – when I rated Mr. Ceballos, I think I rated eight other – seven or eight other candidates, including Mr. Ceballos.

Q. And those seven or eight other candidates also would have been deputies that you would have been supervising at the Pomona branch?

[44] A. Correct.

Q. Okay. And would you have rated the other seven or eight as highly as you rated Mr. Ceballos?

A. I did, except for one.

Q. All right. Do you know if any of the others were actually promoted to Grade IV?

A. Yes.

Q. Out of the – if we're talking about seven or eight, are we including Mr. Ceballos, or are we really talking about eight or nine?

A. You know, it – if you can give me just a minute, I'll try and reconstruct the candidates as I recall them, and I can maybe give you the exact number.

Q. Sure.

(Recess.)

MR. BECERRA: Back on the record.

BY MR. BECERRA:

Q. I think you were going to try to reconstruct as to how many people that you had done the AP on were, in fact, promoted to Grade IV.

A. All right. I have reconstructed a list, which I believe is complete, of ten people, including Mr. Ceballos.

Q. And how many of those were actually promoted [45] to Grade IV?

I have a list and I can't represent to you it's totally accurate. If this would refresh your memory, if you want to look at the list, I don't have any problem with that.

MS. LEE: Maybe it might save some time.

BY MR. BECERRA:

Q. See if it helps at all.

A. Fernando, Manny, Don Clem and Cathy Kady, four.

Q. Okay. Four out of ten?

A. Yes.

Q. And can you mention their names again. Just tell me what their names were again real quick.

A. Fernando Guzman; Manuel or Manny Garcia; Don Clem, C-l-e-m; and Cathy, with a C, and Kady, with a K, K-a-d-y.

Q. Okay. And –

MS. LEE: Is that assuming that list is correct or is that –

MR. BECERRA: That's just assuming for the purposes of the question that the list is correct, and it looks like a copy of General Office Memorandum 00-74. So I assume we can get an original.

[46] THE WITNESS: I don't have any dispute with the list.

BY MR. BECERRA:

Q. Okay. These four that you mentioned – and you don't have to be off the top of your head – but in your own head, can you see why they would be promoted as distinguished from Mr. Ceballos based on what you know?

And I'm not saying that you know everything that downtown or headquarters knows, but just based on what you know.

A. Well, as to those four candidates, they all got rated the same by me, and frankly, of the – let's see, one, two, three, four, five, six, seven, eight of the candidates of my list of ten, I all rated outstanding. And those eight deputies would include Mr. Ceballos. Two of the deputies I rated less than outstanding.

Q. And those two were actually promoted?

A. No. Oh, heavens, no.

Q. Okay.

A. Heavens, no.

Q. But in terms of – in your own mind when you look at the ones that were promoted, if you can draw a distinction between them and Mr. Ceballos, does [47] anything stand out in your mind?

MS. LEE: Of the four you indicated were promoted.

THE WITNESS: I would have to think that the reason Cathy Kady got promoted was because of her trial numbers. She had a very large amount of trial work. Cathy had – was extremely experienced and tried a number of high profile cases for the office. So I would have to believe that that was more than responsible for why she got promoted.

BY MR. BECERRA:

Q. Okay. So that one stands out in your mind. Any of the other three?

A. Well, Fernando always had a lot of trials, jury trials. Don Clem had a lot of jury trials, and so – I mean, if you're – and so I rated them all outstanding. They all had significantly more jury trials than Mr. Ceballos, significantly more, maybe as many as 20 or 30 more juries. And so, you know – but you're asking me, you know, and I didn't make the promotions that Los Angeles did. And the only – and I can't tell you why Manny got promoted, Manny Garcia over Richard. I kind of looked at them as kind of in the same category.

Q. Okay. In terms of – okay. We talked a

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[49] examination and the score on your appraisal or promotability. And I believe they were weighed 50 percent each, I believe.

Q. All right. Now, when – okay. I take it the eligibility list goes up to, we can call it downtown or headquarters, or whatever we want to call it.

A. Yes.

Q. Okay. Is there any further communication in connection with Mr. Ceballos as promotability between yourself and downtown?

A. I think that the director asked me to give him my top three or four candidates of my list of eight candidates, bearing in mind – I mean, I don't know how many promotions they made. You could add them up.

Q. I could count them.

A. I was only one branch. I was one branch in Pomona. I mean, there's ten branches at the office. There's hard-core gangs. There's any number of special units that had candidates. And there's central operations that has candidates. So I mean, the likelihood that any one branch was going to – I was surprised I got four because it's just a numbers deal. And so I believe the director asked me to give [50] him my top three or four candidates.

Q. Okay. Do you remember who you selected?

A. Yeah, I do. Cathy Kady was number one.

Q. Okay.

A. Randy Harris was number two.

Q. Okay. And he actually was not promoted; right?

A. He was not promoted.

Q. All right. And number three?

A. I think it was either Fernando or Don Clem. I mean, they were – and they could have been close because they both had almost the identical jury trials.

Q. Okay.

A. Don had been a calendar deputy. Fernando was doing a special assignment for me in West Covina, working with Judge Lopez and Krissy Weiss.

Q. Okay. Would this communication be like a phone call to you saying, "Look, we've got your list, and I need you, you know, because we only have so much room, I need you to tell me which ones are your top"?

A. That would be exactly the way it would be done, just a telephone call. "I'm going in a meeting. Just give me a thumbnail sketch of who you [51] would think would be your top three or four candidates out of eight."

Q. Okay. And then would it be, "Who are they and why," or would it just be, "Who are they?"

A. Just, "Who are they?" I mean, everybody at this time, theoretically, should know the candidates from downtown, and so I – obviously, my recommendations were followed halfways, and my other recommendations weren't followed. So frankly, I don't know what they did.

Q. Okay.

MS. LEE: Why don't we – so that there's no confusion, I counted the number of promotions – district attorney for promotions, and there is 44; 22 in each column. Why don't we just go ahead and attach this as an exhibit.

MR. BECERRA: I think that's a good idea. And just for the record, I think I put a little mark by the names he mentioned, and that was, like, a little circle. I did that.

MS. LEE: The circle of the candidates that were promoted from Mr. Sundst[e]dt's unit.

MR. BECERRA: Okay.

MS. LEE: Okay.

MR. BECERRA: And I think if we could, I'll [52] have Humberto go to my office and find out the next number and just keep them in sequence, whatever the next number exhibit is, so that way we have it sequentially.

MS. LEE: Oh, from Mr. Ceballos' depo?

MR. BECERRA: Yeah.

MS. LEE: That's fine.

MR. BECERRA: It's just sitting on my desk.

(Interruption in the proceedings.)

MR. BECERRA: Back on the record.

BY MR. BECERRA:

Q. Okay. The request for the – you know, your top folks, do you know if that was pre or post Cuskey? Cuskey would be, I think you would be aware of it, and if we can use the date of March of 2000.

A. Well, I think it would be after the Cuskey case, for sure.

Q. Okay. Did you?

A. I think my – yeah, it would have to be. I don't know when – when did they make promotions effective, August 25?

Q. Yeah.

A. I'm sure it was August sometime.

Q. All right. Shortly before the results were actually announced?

[53] A. Yeah.

Q. All right. In coming up with the top three or four folks, did you consult with Ms. Najera at all on that?

A. No, I did not.

Q. Okay. And in terms of thinking about the top three or four, did you consider Cuskey at all in terms of what had occurred between Mr. Ceballos and the handling of that particular case?

A. No, sir.

Q. Okay. Let's go over to March of 2000. Okay. And I'm using – and I believe we have a memo on that day. Okay. And we don't have to do that, but let me see if this refreshes your memory.

When do you first become aware that Mr. Ceballos has some question as to the police conduct of the handling of the Cuskey matter?

A. I can't tell you the month, but he brought it to my attention, and I believe he brought it to my attention via memo.

Q. Okay. And would that have been the procedure that he should have followed?

A. Yes.

Q. Okay. So best as you can recall, what was it that he was bringing to your attention?

* * *

[56] A. Honestly, I've –

MS. LEE: Calls for speculation.

THE WITNESS: Honestly, I've never heard that one way or the other. I don't think I've ever been privy to any conversation where anybody remarked about Mr. Ceballos' toughness or lack thereof.

BY MR. BECERRA:

Q. All right. So when you received this memorandum questioning the veracity or the honesty of the officers' statements within the declaration, what did you do?

A. I was extremely concerned about it.

Q. Okay.

A. I think the – I did two things. Mr. Ceballos had written a memo where he had – where he had, himself, made conclusions that he had concluded on his own that the police officers had, A, committed perjury, or I mean – but he, Mr. Ceballos' memo was as if he had – was a judge or a jury having listened to both sides of the evidence and concluded that A is correct.

And when I read the memo, I said, "Richard, how can you make these conclusions? I mean, you've – the police have submitted the search warrant. You've made some observations, and based [57] upon your observations, you have concluded on your own, beyond a reasonable doubt, that the officers are guilty of felonies."

And so when you asked me what I did, I said, because we – "We're not there. We didn't go there. You feel that there's an inference that the officers may have committed a crime, but the way you've written your memo is, you've concluded it on your own that they've committed a crime." So I asked him to modify his memo to remove his legal conclusions and phrase them – I mean, his memo is the same, you know, his observations, but put it in a – what the inferences are rather than for Judge Savales, if you will, to have concluded on his own that the police officers had committed a felony.

So that was, I believe, the first thing I did, and he modified the memo and I – and the – and then I called the appropriate supervisor over who the deputy was – or the deputy sheriff that Mr. Ceballos had a suspicion of, or deputies. I think there were two or three of them involved. And I told the captain there that I thought we had a problem with this case, and that I thought we ought to have a meeting to discuss it.

Q. Okay. After receiving the memo, would you

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[63] the sheriff's department?

A. I believe it was within a matter of days from the time I notified the captain until the meeting occurred.

Q. Now, I know it's been a while. I just want to make sure I understand this.

Any request – well, would it be directions or requests to change the memorandum that contained the conclusions of Mr. Ceballos, would that have come from you or Ms. Najera?

A. That came from me.

Q. All right. And would you – how would you characterize it, as an order or as a request?

A. Well, I – speaking as Richard's supervisor, I didn't order him to do it. I mean, if Richard would have said to me, "This is the way I feel. I'm not going to alter it," I would not have changed what I was going to do, but – and I still would have had a meeting, but, you know, I had been in the office a long, long time. I've been a lawyer dealing with fact patterns a long, long time. You have

obviously run into situations where you believed one thing was so, and you found out you – that you were mistaken, and, in fact, it was proven that something else occurred, which made you – not that you were lying [64] about it, but you were just flat-out wrong in what you had concluded.

And so I recommended, as Mr. Ceballos's supervisor, that he not alter anything about what his observations were, that as his supervisor, that he shouldn't posture and make his own legal conclusions because he is a deputy D.A. entitled to his conclusions, but he was going to be a career prosecutor for a long time. And if he was proven to be inaccurate, then he had already convicted somebody when, in point of fact, he was inappropriate or wrong in his conclusion.

So what I was doing was a suggestion as a supervisor to a trial deputy to say to do exactly what you're going to do but eliminate the fact that you have already postured and said this is – and again, as I suggested earlier in an answer, "Richard, don't act like you're the judge and the jury." So all I asked him to do – and it was a request. I wasn't – I didn't order him to alter his memo. I would have if Richard would have sent that or wanted that memo to go, that memo would have went, and that's what we would have done.

Q. Okay. Would this have been after – if you remember, would this have been after the initial [65] meeting that you had with Mr. Ceballos?

A. I don't remember.

Q. Okay. The meeting does in fact occur and you're present?

A. Correct.

Q. Ms. Najera's present?

A. Correct.

Q. Mr. Ceballos?

A. Correct.

Q. And who from the law enforcement agencies were present?

A. There was a lieutenant and a captain and a sergeant, whose name escapes me, who wrote the affidavit, whatever his name was. I think it was Captain Binkley, Lieutena Barstow and whoever the detective's name is.

Q. Does Keith Walls ring a bell?

A. Yes, that's his name.

Q. And was Deputy D.A. Galan also present?

A. Yes.

Q. Did you know who requested he be there?

A. I do not.

Q. And was it your understanding that Galan had actually handled the Cuskey case before Mr. Ceballos had assumed responsibility for it?

[66] A. I'm not aware of that. I know that Mr. Galan went out when Mr. Ceballos viewed the scene. My – but I didn't – I'm not aware, as we sit here, that he was involved in the case at all.

Q. Now, the meeting itself, was that actually requested by the law enforcement folks, or was that something that you initiated?

A. I requested the meeting.

Q. And the purpose of the meeting was?

A. I wanted to – well, since I sent the memo and I called, I wanted to have a meeting to see if the sheriffs had anything to respond to the memo in the meeting. And you know, if you want to call it due process, that's what I was – I mean, we are the prosecutors. We are the lawyers on the case, but that's not to suggest that the sheriffs are not a stakeholder in that particular lawsuit. And so out of fairness, if the case was going to get dismissed, I was going to dismiss it whether I had a meeting or not. But in terms of how I had conducted myself as a manager over, you know, two decades, that's what I did.

Q. Okay. And did anything occur at the meeting that changed your – well, let me ask this.

Did you have an opinion, speaking to

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[68] Q. All right. Okay. Does something occur at the meeting that changes your mind with regards to dismissing or not dismissing?

A. Well, it always – I suppose that as much as the fact that I truly believe that Richard had blinders on and he had postured, if you will, to the exclusion of any other rational explanation as to how the affidavit was prepared, I – after listening to the sheriff who prepared the affidavit and not really listening to the captain as much, or the lieutenant, I wasn't as sure that a dismissal without an

airing of the evidence was the appropriate way to handle a case.

Q. Was there anything that stands out in your mind as to what tilted you towards that?

A. No, not as I sit here, no.

Q. Okay. Now, you mention that it appeared to you that Richard had blinders on?

A. No. Well –

Q. You used that, I think, as an analogy.

A. Richard certainly postured that there was – in his mind, there was no other conclusion, no other conclusion but that three officers, I believe, had feloniously participated in processing a prosecution against these fellows, or fellow. And I think that

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[70] Q. Okay.

A. That certainly would have been an option down the road.

Q. Okay. And that's an option that you wouldn't have considered at that time because of what?

A. Well, being a head deputy, in my estimation also means knowing that you don't know everything. I mean, it's not just being the supervisor and acting presymptom all-knowing.

After the meeting occurred, I was not convinced like Richard was convinced. I just wasn't. I just wasn't. And

since the case was in court and a motion, and I believe, a 1538.5 had already been set, I – again, I'm doing it from recollection. I believed that – that before SID would ever get involved in this case, that I determined that I wanted to hear those guys testify under oath. And I don't mean I wanted to hear it personally. I wanted a black robe to hear it. And based upon that and whatever the judge ruled, if the judge would have suppressed the case and made findings against the credibility of the police officers, I certainly would have involved SID at that point in time.

Q. You knew that there was some hearings in

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[74] 1538.5 is an unusual occurrence. And so I had no expectation, other than Judge Milton would listen to the evidence and do what he felt was best on the case.

Q. Did – after the meeting, did Mr. Ceballos continue to request to have authority to dismiss the case, the Cuskey case?

A. No.

Q. Did he make any accusations as to you specifically kowtowing?

A. No.

MS. LEE: I don't know what it means.

MR. BECERRA: Okay. We're going to find out.

BY MR. BECERRA:

Q. Did Mr. Ceballos suggest to you that you were kowtowing to the wishes of the police department, actually

the sheriff's department, in not dismissing the Cuskey case?

A. No.

Q. Did he criticize you in any way for not dismissing the Cuskey matter?

A. To my face?

Q. Yes.

A. No.

* * *

[80] Q. To your knowledge, was Ms. Najera's husband ever arrested for shoplifting, to your knowledge?

MS. LEE: Objection. It's not relevant but –

THE WITNESS: I don't know.

BY MR. BECERRA:

Q. Okay. So – okay. So therefore, if you don't know, you wouldn't have had anything to do with the prosecution or dismissal or disposition of that?

A. Correct.

Q. All right. Okay. Did you ever speak with Mr. Garcetti about the Cuskey case and the allegations that Mr. Ceballos was making?

A. No.

Q. All right. Did you ever speak to Mr. Garcetti about any employee decisions – I'm sorry – any employee actions that were taken on your part to Mr. Garcetti?

A. No.

Q. And I know I'm ahead of the game here, but did you ever discuss with Ms. Najera reassigning the employment duties of Mr. Ceballos?

Was that something you discussed with her before any of the actions were taken?

A. Before any of what actions?

* * *

[93] Mr. Ceballos?

A. I don't remember. I mean, you know, I got to tell you – and obviously, this has found its way into a lawsuit. My – this was a case I felt that a certain situation arose which caused me to handle this case a little differently, but it was a case, and I didn't – I didn't – I did not drop everything else that was on my radar screen or on my plate, hundreds and hundreds of cases, 28 deputies in Pomona, another 25 to 30 deputies in the outlying courts.

It was – I'm saying it wasn't a big deal to Mr. Ceballos because – obviously, it was, but this was Mr. Becerra. This was just a case to me, so I don't have any, you know, real recollection as of what happened afterwards standing out because the judge made a call. And as far as I'm concerned, it was over.

Q. Okay. So the – I don't want to call it switching, making Mr. Ceballos a co-calender deputy your purpose in doing that was what?

A. All right. I'm painfully aware because I have read the complaint, and I've read the grievance that Mr.

Ceballos accused me of demoting him from a calendar deputy position to a trial deputy position.

[94] I have to tell you that – and I've refrained from making any personal commentary – that is flat-out untrue. Mr. Ceballos knows. The superior court knows that. In April of 2000 the superior court, and it was – was it consolidated then? I don't think it was. Superior court in Pomona changed its method of operating its criminal business. It went from four direct calendar courts to two master calendar courts. When it was four direct calendar courts, Mr. Ceballos had one of the four direct calendar courts. Don Clem had one of the four direct calendar courts. Both of those deputies were Grade III deputies. The other calendar courts were staffed by Grade IV deputy D.A.s, Michael Grossbard and Debra Pathow.

When the superior presiding judge of Pomona announced that the court was changing the way it does business, and it's collapsing the four direct calendar courts into two master calendar courts, I had two Grade IV deputies that were doing calendar work. I was not going to take two Grade IV deputies and make them less than calender deputies and make Grade III deputies the calender deputies.

And so by operation of the way the building changed its criminal business, Mr. Ceballos became a [95] a co-calendar deputy with Mr. Grossbard in the – and I believe it was Department N in Pomona. Mr. Grossbard – I mean, Mr. Ceballos was never demoted. It has – it has as much relationship to Cuskey as a raccoon out in the forest has to – it's just – and I can't tell you that it is the most disingenuous, if not dishonest, allegation of the

things that I've read, and you can – and this is just a matter of record.

And I made pains to tell the deputies ahead of time. I even had a big meeting to explain to them at a location, whose name escapes me, and I told the deputies how the building was going to change. It did change. I told the deputies that I wanted co-calendar deputies in each court because I wanted the co-calender deputies to run that court and create and establish their own vacation schedules to ensure that both co-calendar deputies would not be gone at the same time, and that was up to them. And Mr. Ceballos was one of those calendar deputies assigned with Mr. Grossbard to Department N and that if that is retaliation in some fashion for Mr. Cuskey, I don't know where that comes from.

Q. Well, let me ask you this.

Do you feel that your relationship changed [96] at all following the Cuskey hearing with Mr. Ceballos?

And let's talk about before you get the grievance, and let's talk about before the lawsuit.

A. I don't think my relationship with Mr. Ceballos changed. I think perhaps his relationship with me changed.

Q. And what makes you say that?

A. Well, he avoided me. I mean – and I can't establish a date because, you know, he was one of – only one lawyer in a staff of – I had 50 people, including secretaries, paralegals, lawyers. I mean, at least he was two percent of my staff that – it became clear to me that the cases that were assigned to him would be brought into my office by

other deputy D.A.s rather than him coming to my office because I had an in-box and an out-box and routinely the deputies, when a case was concluded, would come into my office and drop off the files before the Cuskey case, and I don't know, maybe even after.

It became clear to me that at some point in time Mr. Ceballos stopped coming in to drop off cases in my office, although I could see on the file that they were cases handled by him. Other deputy D.A.s that officed with him would bring me in the files, so [97] I did not change my relationship with Mr. Ceballos.

Q. I think you mentioned that you had reviewed the grievance and the complaint.

A. Yes, sir.

Q. Are you aware that he has indicated that a case called *People versus Perrin*, P-e-r-r-i-n, was taken from him, again in retaliation, and given to a Grade II deputy after the meeting with the sheriff's department?

A. Well, I'm aware that that case was given to a Grade II deputy, and I'm aware that it happened after the Cuskey episode, and if you would like me to –

Q. Yeah, I was just going to ask you –

A. – address that, I certainly would be happy, though.

Q. Do you know why that case was reassigned to a Grade II?

A. Yes.

Q. And what was that?

A. The case was given to Steve Galan. Steve was – had been assigned to me for, I guess, about a year, maybe a little over a year. He was an extremely promising Grade II, and he had tried, I think, about three dozen jury trials for me, got, I [98] believe, excellent results.

You know, as county deputies go, everybody wants, at some point in time, to try homicide cases. That's the nature of trial work. You don't want to continue to do trial burglaries and robberies. You want to try a death case. I made sure that before he got transferred – because he was on a track to go to juvenile for six to nine months where they don't do jury work, and I wanted him to try a homicide case before he left for juvenile.

I selected the Perrin case because it was a case that was, in the parlance, not a very good case. It was a homicide case where the theory of the People was reckless discharge of a gun resulting in a murder. And as you know, because you've been in the business a long time, the scenario was that these people that were dealing dope were afraid that some other contingent was going to come over and have a fight with them because they were taking away their dope business. So the medullae (sic) is dopers attacking dopers. Our defendant rushed over to this house and was waving a gun around and discharged a bullet, and the bullet hit a gal in the back, one bullet, and killed her. And we filed homicide based upon an abandoned and malignant hard reckless [99] discharge theory.

I mean, you know what that case is worth? I tried to dispo that case for a voluntary manslaughter for 21 years, knowing full well that I didn't have an intent to kill, but thinking that, yot know, if a guy goes even on a second-degree murder with a gun, when I think was a 25-to-life

gun, so he's looking at 40 to life if he falls on murder with the use. So I offered 21 years. Everybody knew I offered 21 years.

And point of fact, I did all of this while Mr. Ceballos was still the deputy assigned to the case. The case was – so I selected this case for Mr. Galan for two reasons. When you're mentoring, you don't want to give a kid a good case and have him lose it and lose all of his confidence. He knew up front that I had very little expectation that we would sustain our burden to establish a murder conviction, which we didn't. I think the defendant was ultimately convicted of involuntary manslaughter with a gun and got a 14- or 15-year sentence, which everybody that knows the business, including Mr. Ceballos, knew was the most likely and probable event after a jury trial.

And that's the case that I gave to [100] Mr. Galan so that he could try his first homicide case, not feel too bad if he didn't get the desired result of murder and yet say that he had the experience of trying a homicide case. I did not remove the case from Mr. Ceballos for any sinister reason at all because my job was not to be the deputy supervisor for Ceballos. It was to be the deputy supervisor for everybody in my office, including the experience based for the Grade II's that deserved it.

Q. To your knowledge, are the number of 187 cases handled successfully by a deputy in your office, is that something that's considered in terms of promotion?

Maybe the better word would be promotability.

A. Sometimes. Sometimes. Because, you know, you're – when this office changed over time to become so segmented where you had deputies in appellate division

who never get a chance to try a murder, and their head deputy would always be complaining to their directors, say, it's not fair to a guy that works for me that never gets a chance to try a murder. Why don't you measure my lawyer about what his value is to my unit versus just looking at hard-core gang, and all they do is try murders. So [101] obviously, they are going to look better than my lawyer who is arguing before the court of appeal.

And so at some point in time within the last decade, the office, I think, truly recognized that certain deputies should be promoted, even though they are not trying the sexy cases, the murder cases. And so everybody in the office would always tell you that they thought that hard-core gangs – there was a bias in favor of hard-core gangs because all they did was try murders. And maybe there was some merit to that, but I think you would find now that a person in the appellate division, a fraud division, sex crimes division, would now have a better crack at bat, so that it's not necessarily true that you had to be trying homicides to get promoted.

Q. So would you have been the one to personally have made the decision to transfer *People versus Perrin* to the other deputy?

A. I believe I did.

Q. Okay. And would you have discussed the way you just did with me now the basis for doing that with Mr. Ceballos?

A. I – I – yes. I never made any decision without discussing the why of it. I just didn't do it. It's just not my style.

[102] Q. Do you have any recollection of what Mr. Ceballos's reaction was when you indicated to him you were going to be transferring this to a Grade II, this particular case?

A. I don't recall.

Q. Do you actually recall a meeting with him, though?

A. I do believe, Mr. Becerra, as I sit here, no. But all I'm telling you is, is that that's what I normally did. I wasn't – I didn't sneak around and do things behind people's back. I just – that just I had a reason for doing what I did. And I normally articulated the reason to the people affected by the decision.

Q. All right. At some point do you make a decision that Mr. Ceballos is going to be transferred to – I think technically it's called the Rio Hondo Judicial District as distinguished from being in the east district of Pomona?

A. Well, I made a decision that Mr. Ceballos was going to take a tour of duty, filing, filing cases. And that – I don't know whether we touched upon it earlier, but of all the jobs in the D.A.'s office, filing cases is probably the least glamourous because all you're doing is saying "hi" to the cops, [103] reading police reports and filling out a yellow sheet and filling out statement of facts. It's not very glamourous if you are trained to be in a courtroom.

I had notified Mr. Ceballos – I had notified, frankly, everybody that worked for me that I had a situation where I had – I was responsible for staffing filing deputies in Rio Hondo, El Monte. I was responsible for staffing filing deputies in Citrus, and I was responsible for filing staffing in Pomona. So I had two filing spots in Rio Hondo, two

filing spots in Citrus and two filing spots in Pomona. I needed at any given point in time six filing deputies to run my operation. I had one filing deputy, his name is Randy Harris, who enjoyed filing and wanted to stay filing. Of the other five positions, I didn't get volunteers, so I had to tell everybody on my staff that they would have to share the pain, so to speak, and that I would rotate filing responsibilities amongst all the Grade III's and maybe even some of the Grade IV deputies.

Mr. Ceballos knew this because I mentioned it at my daily calender deputy meetings for probably a year before Cuskey happened. I had – and I'm just looking at this list of the ten people that were sitting for that promotion. I told Don Clem that he [104] would have to at some point file. Eugene Hanks, I'm sure you know, I made a filing deputy. Ed Miller, who is the same grade, Grade III, as Mr. Ceballos, sat out in Rio Hondo, and I thought he liked it, and that's why I didn't move him. And then all the sudden he called me one day and said, "Frank, you know the Grade IV examination is coming up, and I'm not going to look as good as the other candidates because I've been out here filing. Could you move me to Pomona so I can get some more trials before I sit for the promotional test?"

I said he had – "I would have moved you a long time ago, but I thought you liked it, and you didn't complain." So it took a decision off of my neck. As soon as he told me he wanted to try cases, I moved him.

Manny Garcia – as a matter of fact, I told Manny Garcia that he was going to go file a week after he got promoted to Grade IV. I think, as it turns out, we had some other changes, and it didn't come to pass. Fernando not only did filing for me – Fernando Guzman not only did

filing for me, but he was willing to leave Pomona court where he lived and go to Citrus, not a great deal drive difference, and work with Judge Lopez.

[105] And the early disposition court that really helped the whole building because it got rid of cases prior to prelim stage, and from then, total team player, total, said, "Whatever you need." Cathy Kady who was probably number one on the promotional list, on everybody's list, was the filing deputy in Pomona for me for one year, and Richard Ceballos was supposed to replace her. He was supposed to replace her and would have replaced her in Pomona so he wouldn't have never had to go to Rio Hondo. He knew it. The building knew it. I moved Cathy Kady up with Grossbard to be co-calendar deputy because she had never been a calendar deputy, so I made the move. And so Richard Ceballos was supposed to take Cathy Kady's place, filing in Pomona.

As it turns out, I had another Grade III female deputy who turned out pregnant whose doctor ordered her out of court. And so she had to be at a desk job off her feet and so – Nancy Dukellis is her name. D-u-k-e, double l, i-s. She, unfortunately, took the filing spot that Mr. Ceballos would have taken, but she got pregnant and there's nothing I can do about that.

Keith Thompson, Grade III, was a filing deputy. He was a trial deputy in Pomona. And I put [106] him in Citrus to do his filing responsibilities. And Randy Harris, of course, was the deputy that enjoyed filing and stayed there.

So the fact that Mr. Ceballos got transferred to be a filing deputy is because he was treated identically with

every other Grade III that I had on staff there, and everybody in the – in my office knew it.

Q. Mr. Ceballos will eventually file a grievance against you?

A. Yes.

Q. Before I get to his grievance, did Mr. Grossbard file a grievance against you for these transfers?

A. No.

Q. Okay. He never filed a grievance against you?

A. No.

Q. Did any of the deputies that were transferred to those positions file a grievance?

A. No.

Q. All right. Now, Mr. Ceballos, does file a grievance against you.

A. Yes.

Q. All right. And the procedure is such that

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[110] she was – she was being grieved along with me. We were co – whatever you want to call us.

Q. Yes. I'm not sure what the right term is either.

MS. LEE: Co-retaliators.

BY MR. BECERRA:

Q. All right. And would this have been after you got the grievance, or would this be at the time Mr. Kinoke is going to come out and do the interview?

A. After the grievance, before Kinoke came out.

Q. Okay. And would this have been something, like, informal, where you just call up and say, "Hey, I would like to chat with you, appears there's been a grievance filed against us"?

A. No, it was probably like, "What kind of crap is this?" It was – you know, but I mean, it was not formal. I mean, it was, you know just –

Q. Do you remember anything she said about the grievance?

A. No, I don't remember – I remember being disappointed, discouraged, but, you know, I've been in a lot of higher places and had, you know, negative personnel things to deal with. And so it was just a matter of disappointment. It did affect my way that I perceived Mr. Ceballos, totally.

[111] Q. Well, it sounded like from earlier testimony that the relationship changed from your perspective, in the sense Mr. Ceballos was avoiding you?

A. Correct.

Q. And he, in fact, is transferred out to El Monte?

A. Correct.

Q. Okay. Now, El Monte is still part of your authority as the head deputy of Pomona?

A. Correct.

Q. All right. So do you continue to have a professional relationship with him in terms of supervision?

A. Not after the grievance. I told the director I would make no decisions regarding him, although he remained in El Monte. I wasn't going to have anything to do with him.

Q. Okay. Then who would have been supervising him?

A. Well, there was a deputy in charge. There was a deputy in charge of Rio Hondo, and I'm trying to remember who that might have been at the time.

Q. Okay, You know what, I probably have that in my record.

A. There's a DIC out there. DIC is short for

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[117] don't – and I don't know whether the policy was implemented prior to Mr. Garcetti's departure as D.A. or not. I don't know.

BY MR. BECERRA:

Q. Okay. And I'm just going to jump around a little bit, and then we'll be through.

A. Okay.

Q. To your knowledge, did Ms. Najera ever attempt to get Mr. Ceballos to change his testimony in any way before he testified on the motion to traverse the warrant?

A. Well, I don't know of – if you're asking me whether she did something with Mr. Ceballos when the

two of them were talking and I wasn't present, I don't know that that occurred because I wasn't there. I can tell you that I do not believe that it ever occurred because of her marching orders. I told her that I wanted Judge Milton to have available to him every – every piece of information out there so that he could make an informed decision.

Q. After the Perrin case was taken, the 187 case was taken from Mr. Ceballos and transferred to another deputy, were any new 187 cases assigned to, Mr. Ceballos, to your knowledge?

A. I would think not. I would think not.

[118] Q. And would that have been because of the transfer in his position?

A. Well, no, not necessarily. First of all, there wasn't – we had a real – I mean, it's funny in the business how you think it's a – you know, we didn't have a lot of murders. We didn't have a lot of murders. Good thing for the public; bad thing for the D.A.'s office. Because the lawyers want to try homicide cases, and it just so happens that if you eliminate the hard-core section, which took all the murders, that there just wasn't all that homicide during that period of time. So I'm not sure that his transfer to filing had any bearing on that or not, although it may well have.

Q. Were you interviewed by anyone who claimed to be representing Mr. Ceballos in connection with the grievance procedure?

And who I'm thinking of, for example, Mr. Busanich.

A. No.

Q. And you knew Mr. Busanich?

A. Oh, I know him.

Q. You have a little smile on your face there.

Is he another deputy who's been in the office for a significant time, such as yourself?

* * *

PLAINTIFF'S EXHIBIT B

Year: 2000

GOM No: 00-74

GENERAL OFFICE MEMORANDUM 00-74

To: ALL DISTRICT ATTORNEY PERSONNEL
From: GIL GARCETTI
District Attorney
Subject: PROMOTIONS
Date: AUGUST 28, 2000

I am pleased to announce the following Deputy District Attorney IV promotions effective August 25, 2000:

Lori Ann Aiu
David Brougham
Kathleen Cady
Jonlyn Callahan
George Castello
Deanne Castorena
Donald Clem
Valerie Cole
Debra Cole-Hall
Natasha Cooper
Dale Cutler
Jessica Dabney
Patricia Doyle
Larry Droeger
Frank Duarte
Anthony Ellis
Joseph Esposito
Gretchen Ford
Manuel Garcia, Jr.
Teresa Gomez
Scott Goodwin
Richard Goul
Fernando Guzman
Mary Hanlon-Stone
Georgia Huerta
Steven Katz
Laura Laesecke
Cheri Lewis
Ana Lopez
Michael Mallano
Scott Millington
Kateri Modder
John Morris

John Nantroup, Jr.
Maria Palomino
Shonte Penland
Michael Pettersen
Shawn Randolph
Cynthia Rayvis
Laura Rosenthal
Thomas Rubinson
Brian Schirn
Kathryn Solorzano
Kraig St. Pierre

DANILO J. BECERRA, ESQ, SBN 56526
MORENO, BECERRA, GUERRERO & CASILLAS
A Professional Law Corporation
3500 West Beverly Boulevard
Montebello, CA 90640-1541
Telephone: (323) 725-0917
Facsimile: (323) 725-0350

HUMBERTO GUIZAR, ESQ. – SBN – 125719
LUIS A. CARRILLO, ESQ. – SBN 70398
Attorneys at Law
3500 W. Beverly Boulevard
Montebello, CA 90640-1541
Telephone: (323) 725-1151
Facsimile: (323) 725-0350

Attorneys for RICHARD CEBALLOS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, Individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually, and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 through 10, Inclusive, Defendants	) CASE NO:) CV 00-11106 (AHM) (AJWx))) **SECOND AMENDED COMPLAINT:**)) **1. VIOLATION OF CONSTITUTIONAL RIGHTS, FIRST AND FOURTEENTH AMENDMENTS, 42 U.S.C. § 1983**)) **2. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**)) **DEMAND FOR JURY TRIAL**)) (Filed Oct. 1, 2001)

JURISDICTION

1. This is an action brought pursuant to the laws of the United States, to wit, 42 U.S.C. § 1983. The jurisdiction of the Court is predicted upon said statute and 28 U.S.C. § 1331 (federal question).

2. In addition, plaintiff invokes the supplemental jurisdiction of the Court pursuant to 28 U.S.C. § 1367 over claims based upon laws of the State of California. Each of these state law claims arises out of the same set of operative facts as do the aforesaid claims brought under the laws of the United States and form part of the same case or controversy.

PARTIES

3. Plaintiff RICHARD CEBALLOS (hereinafter plaintiff) is a thirty-six (36) year old male. At all times herein mentioned, plaintiff is, and has been, a citizen of the State of California. Plaintiff RICHARD CEBALLOS, is a Deputy District Attorney III, employed by the District Attorney's Office of Los Angeles County and has been so employed for the last eleven years.

4. Defendant County of Los Angeles, (hereinafter referred to as "COUNTY") is a municipal Corporation, in the County of Los Angeles, in the State of California.

5. At all times herein relevant, Defendant GIL GARCETTI, (hereinafter referred to as "GARCETTI") has been a resident of the County of Los Angeles and was elected as the head of the COUNTY District Attorneys Office by Los Angeles County citizens (LACDA). He is hereby sued in his personal capacity. Defendants FRANK SUNSTEDT and CAROL NAJERA are employed by

COUNTY as Deputy District Attorneys, they are hereby sued in their personal capacity.

6. Defendants FRANK SUNSTEDT and CAROL NAJERA are hereby sued for their personal roles in directing, and ratifying the retaliation against Plaintiff for speaking against, and his refusing to condone the illegal and unconstitutional search of a suspect(s) in a criminal proceeding, and for Plaintiff's attempts to comply with the Constitutional mandates regarding exculpatory discovery to a criminal suspect. Defendants FRANK SUNSTEDT, CAROL NAJERA and GIL GARCETTI, are hereby sued for their roles in retaliating against Plaintiff for speaking out and refusing to condone acts of police misconduct, including perjury, filing of false police reports, and reporting criminal police misconduct.

7. At all times pertinent to this complaint, Defendant GIL GARCETTI was duly elected as District Attorney of the County of Los Angeles, part of his duties being to make and administer all prosecution and attorney personnel-employment policies for LACDA, and to serve as the chief executive and administrative officer for the LACDA. Defendant GARCETTI is sued in his individual and personal capacities.

8. At all times pertinent to this Complaint, the Defendants acted under color of law in their personal capacities; further, the Defendants acted separately and in concert under color of the law. At all times herein, each Defendant was acting as an agent of each other Defendant.

9. At all times pertinent to this Complaint, Defendants separately and in concert executed administrative and attorney personnel-employment policies and customs

established by directive and/or practice, by the County and/or LACDA, and/or officials empowered by law to make or express licensing and regulatory policy for the County and the LACDA; further, the County and LACDA, and those officials empowered by law to make or express law enforcement policy for the County and LACDA have, by words, action and/or inaction caused and/or ratified the unlawful acts of the individual County Defendants, including, but not limited to, a failure to adequately train, control and/or discipline individual County Defendants, or to provide them with the necessary policies, direction and means for addressing the matters involved herein.

10. The individual Defendants, separately and in concert, conspired to engage and engaged in the illegal conduct here mentioned to the injury of Plaintiff of the rights, privileges and immunities secured to Plaintiff by the First and Fourteenth Amendments to the Constitution of the United States and the laws of the United States. One or more of said individual Defendants acted in furtherance of said conspiracy.

11. The individual Defendants, separately and in concert, conspired to engage and engaged in the illegal conduct here mentioned to the injury of Plaintiff of the rights, privileges and immunities secured to Plaintiff by the Constitution and laws of the State of California, thereby denying Plaintiff the equal protection of the laws of the State of California and due process of law rights secured to Plaintiff by the Fourteenth Amendment to the Constitution of the United States. One or more of said individual Defendants acted in furtherance of said conspiracy.

12. The Defendants, and each of them, knew or reasonably should have known that the wrongs here mentioned were about to be committed, and further had the power to prevent or aid in preventing the commission of the same. Despite this, Defendants refused and/or failed to prevent or aid in preventing the commission of said wrongs, and said wrongs were in fact committed, denying Plaintiff his rights secured under the First and Fourteenth Amendments to the Constitution.

FACTUAL ALLEGATIONS FOR ALL CAUSES OF ACTION

13. Plaintiff RICHARD CEBALLOS, is employed for defendant COUNTY as a Deputy District Attorney III, employed by the COUNTY District Attorney's Office, and has been so employed for the last eleven years. Prior to March 2, of the year 2000, and prior to the events that led to this complaint, Plaintiff was working in his official capacity as a Trial Deputy District Attorney in the East District of the Los Angeles County Superior Court. His job duties included full responsibility for the prosecution of criminal defendants charged with murder, and the prosecution of other serious felony cases. On or about March 2, 2000, plaintiff submitted a memorandum entitled *People* vs. *Michael Cuskey,* Case No.: *KA045491,* to defendant FRANK SUNSTEDT, who was the East District's Head Deputy District Attorney for COUNTY. (*People* vs. *Michael Cuskey,* was a criminal case that plaintiff was assigned to prosecute on behalf of the COUNTY District Attorney's office). In said memorandum, plaintiff informed defendants SUNSTEDT and GARCETTI that three COUNTY Sheriff's Department Deputies had engaged in unconstitutional and unlawful misconduct, to wit, misrepresentations of facts and

omissions of material facts they submitted in a sworn affidavit that was used by them to obtain a search warrant of a residence in violation of the Constitution of the United States. Plaintiff further indicated in his memorandum that the affidavit was false, inaccurate, and incomplete, and that the search warrant should be quashed. He further indicated that the aforementioned misconduct should result in having the charges filed against the defendants dismissed. As a direct result of Plaintiff's March 2, 2000 memorandum, (his refusal to condone illegal Sheriff misconduct) Plaintiff was repeatedly subjected to multiple acts of retaliation by defendants SUNSTEDT, NAJERA and his supervisors in the East District's Attorney's office, and, said conduct was directed, approved, and ratified by defendant GIL GARCETTI.

The Defendant's acts of retaliation against Plaintiff for his report of Sheriff Deputy misconduct:

14. On March 6, 2000, in defendant SUNSTEDT's first official response to Plaintiff's March 2, 2000 memorandum, he stated to plaintiff that a COUNTY Sheriff's Department Captain was requesting a meeting prior to the dismissal of the criminal charges in *People* vs. *Michael Cuskey.* On March 9, 2000, plaintiff met with defendant COUNTY, defendants SUNSTEDT and NAJERA, a COUNTY Sheriff's Department Captain, a COUNTY Sheriff's Department Lieutenant, and a COUNTY Sheriff's Department Detective. At said meeting, the Sheriff's Department Lieutenant ordered and demanded the removal and recusal of plaintiff from the *People* vs. *Michael Cuskey,* case. The Sheriff's Department Lieutenant did not say anything regarding the Cuskey case other than accusing plaintiff of acting like a defense attorney and not

a prosecutor. Defendants SUNSTEDT and NAJERA did not object in any manner to the Lieutenant's request and instead agreed and acquiesced in the removal of plaintiff because he would not condone Sheriff's misconduct.

15. On March 14, 2000, defendant SUNSTEDT informed plaintiff that henceforth plaintiff would be reassigned from the position of Trial attorney to a lower level position.

16. On March 14, 2000, plaintiff informed defendants SUNSTEDT and NAJERA that he was subpoenaed by the defense attorney in *People* vs. *Michael Cuskey,* on a Motion to Traverse the search warrant in the Cuskey case.

17. On March 15, 2000, defendant NAJERA removed plaintiff from another murder case previously assigned to plaintiff and reassigned the murder case to a different inexperienced grade 2 Deputy District Attorney that had never previously tried a murder case. On March 16, 2000, plaintiff reiterated his belief to defendant NAJERA that the Sheriff's Department deputies had lied in the affidavit for the search warrant and that if plaintiff was called to testify at the Motion to Traverse hearing, he would disclose that information. Thereupon, Defendant NAJERA verbally reprimanded and berated plaintiff by telling plaintiff that his actions and statements of reporting the Sheriff Deputies misconduct would get plaintiff "in trouble with the District Attorney's office". NAJERA's acts was an attempt to intimidate plaintiff in a concerted attempt to dissuade plaintiff from testifying truthfully at the Motion to Traverse hearing and was an attempt to coerce plaintiff to ratify illegal Sheriff misconduct.

18. Following the Motion to Traverse hearing heard on March 20, 2000, Defendants SUNSTEDT and NAJERA

did *not* assign any further murder cases to plaintiff and retaliated further against plaintiff by giving plaintiff the "silent treatment" and then creating a hostile work environment for plaintiff.

19. Another act of retaliation occurred on August 25, 2000, as plaintiff was denied a promotion to Grade IV by defendants, GARCETTI, SUNSTEDT and NAJERA, even though plaintiff had scored 100 in the oral exam and had received outstanding evaluations from his supervisors in the previous two years and prior to reporting the misconduct. Finally, on August 28, 2000, the Defendant's retaliated against plaintiff by having plaintiff reassigned to the Rio Hondo District of the Los Angeles Municipal Court, to simply work as a District Attorney Filing Deputy.

20. Defendant, District Attorney, GIL GARCETTI, was aware of the retaliation plaintiff was being subjected to. However, defendant GARCETTI was more concerned with his reelection in a very tight run-off for the District Attorney's office, and he did not want to alienate Sheriff's Department and other Law Enforcement agencies that previously supported him. Defendant GARCETTI also agreed and acquiesced in the retaliation of plaintiff in order to punish plaintiff for his failure to condone the exposed Sheriff misconduct, and for Plaintiff's attempts to publicly take his grievance and the misconduct issues to the Mexican American Bar Association, a public forum.

21. Plaintiff has filed timely claims with the CITY OF LOS ANGELES City Clerk's Office, with regards to its State Causes of action. Plaintiff timely filed the appropriate internal grievance through the internal guideline set forth in the District Attorneys Office. In his grievance

Plaintiff complained that he was being singled out and retaliated against as stated above.

22. While Plaintiff's internal employment grievance was pending, Plaintiff sought the assistance of a non-profit legal bar association, the Mexican American Bar Association, (hereinafter MABA). Plaintiff contacted the President of MABA and asked him if he could be placed on the MABA board's agenda at its next meeting to address his case to the MABA board. In response to Plaintiff's request, the MABA president contacted defendant GIL GARCETTI and informed him of Plaintiff's request. Defendant GIL GARCETTI advised the MABA president that there was no need for MABA to hear Plaintiff, that he was aware of plaintiff's grievance, and that he would "take care of the situation". Approximately two days after attempting to meet with MABA, Plaintiff's grievance was denied and plaintiff was thereafter transferred to an undesirable court house to work as a filing deputy.

23. The defendants, and each of them, knew or reasonably should have known that the wrongs mentioned herein were about to be committed, and further had the power or aid in preventing the commission of the same. Despite this defendants refused and/or failed to prevent or aid in preventing the commission of said wrongs, and said wrongs were in fact committed, denying plaintiff his rights secured under the First and Fourteenth Amendments to the Constitution.

24. As a result of the retaliation, harassment, and mistreatment of plaintiff, his job as a District Attorney has become totally unbearable and he is subjected daily to a hostile work environment.

FIRST CAUSE OF ACTION

VIOLATION OF CONSTITUTIONAL, RIGHTS; FIRST AND FOURTEENTH AMENDMENTS, 42 U.S.C. §1983 Against Defendants FRANK SUNSTEDT, CAROL NAJERA, GIL GARCETTI, and Does 1 through 10, inclusive, in their personal capacities

25. Plaintiff restates and incorporates by reference each and every allegation contained in paragraphs 1 through 24 inclusive, as though fully set forth herein.

26. In perpetrating the above described acts and omissions, defendants SUNSTEDT, NAJERA and GARCETTI were, at all relevant times herein, its agents/employees. Therefore, defendants' above-described acts and omissions constitute cognizable state action under color of state law.

27. In perpetrating the above-described acts and failures to act, the defendants, and each of them, engaged in of restraining plaintiff's free speech on a matter of public concern and retaliating against Plaintiff because of such speech, in violation of the First Amendment to the United States Constitution. Because rights under the Constitution are federally protected, defendants also violated plaintiff's rights under 42 U.S.C. §1983.

28. As a direct and proximate result of the unlawful conduct of defendants, and each of them, as alleged herein, plaintiff has suffered and will continue to suffer loss of seniority, earnings, employment and retirement benefits and promotional opportunities in an amount as yet not specifically ascertained but subject to proof of trial.

29. As a direct and proximate result of the unlawful conduct of the defendants, and each of them, as alleged herein, plaintiff has suffered and continues to suffer humiliation, mental anguish and emotional distress, including, but not limited, to anxiety, depression, fear, irritability, aversion to leaving his house, withdrawal, and loss of productive work time, and he has incurred costs, all in an amount as yet ascertained but subject to proof at trial.

30. The conduct of defendants, and each of them, as alleged herein, is ongoing and continuous. Because defendants' treatment of plaintiff impacts plaintiff's emotional state as well is his ability to find alternative employment, legal remedies alone are insufficient.

31. All of the actions of the defendants alleged herein, separately and in combination, deprived Plaintiff of substantive due process rights by unlawfully depriving him of his liberty interest in pursuing his profession and advancement therein; and maintaining his professional reputation, standing, and ability to earn an income.

SECOND CAUSE OF ACTION

(INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)
Against Defendants FRANK SUNSTEDT, CAROL NAJERA, and Does 1 through 10, inclusive, in their in their [sic] personal capacities]

32. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 31, inclusive, hereof as though fully set forth herein.

33. As described above, defendants and their agents/employees and Does 1 through 10, inclusive, engaged in

outrageous conduct towards plaintiff with the intention to cause, or with reckless disregard for the probability of causing, plaintiff to suffer, inter alia, severe physical and emotional distress. Plaintiff suffered damages as a consequence of the specific use of official power to deter a particular protected activity – the proper reporting of on-the-job or job-related unlawful government actions. The distress was a result of conduct and/or risks not within the compensation bargain. To the extent that said outrageous conduct was perpetrated by certain defendants, the remaining defendants confirmed and ratified said conduct with the knowledge that plaintiff's emotional and physical distress would thereby increase, and with a wanton and reckless disregard for the deleterious consequences to plaintiff.

34. As a direct and legal result of defendants' wrongful actions and failures to act, plaintiff has suffered and will continue to suffer significant physical injury, pain and suffering, and extreme and severe mental anguish and emotional distress; she [sic] has incurred and will continue to incur medical expenses for treatment by psychotherapists and other health professionals and other incidental expenses.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment as follows:

1. For compensatory damages including lost wages, vacation benefits, medical bills, mental and emotional distress, an [sic] other special and general damages according to proof;

2. For an award of interest, including pre-judgment interest, at the legal rate;

3. For a permanent injunction enjoining defendants, their agents, successors, and employees, and those acting in concert with them, from engaging in each of the unlawful practices, policies, usages, and customs complained of herein and providing such other injunctive relief as the court may deem proper;

4. For reasonable attorneys' fees pursuant to 42 U.S.C. §1988 and California Code of Civil Procedure §1021.5, and any other appropriate statutes;

5. For costs of suit incurred herein;

6. For a jury trial on all issues so triable; and

7. For such other and further relief as the court may deem just and proper.

DEMAND FOR JURY TRIAL

COME NOW Plaintiff to the present action and request that this court assign the present matter for jury trial.

DATED: October 1, 2001

MORENO, BECERRA,
GUERRERO & CASILLAS
A Professional Corporation

BY: /s/ [Illegible]
DANILO J. BECERRA, Esq.
Attorneys for Plaintiff
RICHARD CEBALLOS

[Proof Of Service Omitted In Printing]

CINDY S. LEE, State Bar No. 168941
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, California 91101-3005
Telephone No. (626) 304-7830
Facsimile No. (626) 795-7460

Attorneys for Defendants
GIL GARCETTI, FRANK SUNDSTEDT,
and CAROL NAJERA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive, Defendants.	) Case No.) CV 00-11106 AHM (AJWx)) Honorable A. Howard Matz) **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF INDIVIDUAL ISSUES; MEMORANDUM OF POINTS AND AUTHORITIES** [F.R.C.P. 56] Date: January 7, 2002 Time: 10:00 a.m. Courtroom: 14 [Declaration of Cindy S. Lee and Exhibits; Statement of Uncontroverted Facts and Conclusions of Law; and Proposed Judgment filed concurrently herewith] (Filed Dec. 18, 2001)

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 7, 2002, at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom "14" of the above-referenced Court located 312 North Spring Street, Los Angeles, California 90012, defendants GIL GARCETTI, FRANK SUNDSTEDT and CAROL NAJERA will and do hereby move this Court, pursuant to Federal Rules of Civil Procedure, Rule 56, for an order granting summary judgment in favor of defendants and against plaintiff RICHARD CEBALLOS.

Alternatively, Defendants request that the Court summarily adjudicate issues in their favor for the following reasons:

1. With regard to the First Cause of Action alleged in Plaintiff's Second Amended Complaint ("SAC"):

a) Defendants Garcetti, Sundstedt and Najera are entitled to qualified immunity because plaintiff did not engage in speech protected by the First Amendment;

b) Defendants Garcetti, Sundstedt and Najera are entitled to qualified immunity because they did not violate a clearly established constitution right; and

c) Defendants Garcetti, Sundstedt and Najera are entitled to qualified immunity because their conduct was objectively reasonable at all relevant times.

2. With regard to the Second Cause of Action alleged in Plaintiff's SAC:

a) Defendants Sundstedt and Najera did not engage in extreme and outrageous conduct as a matter of law;

b) Defendants Sundstedt and Najera did not cause plaintiff to suffer severe or extreme emotional distress; and

c) Defendants Sundstedt and Najera are nevertheless entitled to immunity under California Government Code § 821.6.

This Motion is made following counsel for Defendants' unsuccessful attempt to meet and confer pursuant to Local Rule 7.4.1 several times shortly after October 24, 2001. (*See*, Declaration of Cindy S. Lee.)

This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the declarations and exhibits filed herewith, the Separate Statement of Undisputed Material Facts and Conclusions of Law, and upon such further evidence, both oral and documentary, as may be presented at the hearing of this Motion.

DATED: December 17, 2001

FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE

By /s/ Cindy S. Lee
Cindy S. Lee
Attorneys for Defendants
GIL GARCETTI, FRANK
SUNDSTEDT, and
CAROL NAJERA

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Plaintiff is a Grade Level III Deputy District Attorney with the Los Angeles County District Attorney's Office who alleges he was subjected to adverse employment actions by former District Attorney Gil Garcetti, former Head Deputy District Attorney Frank Sundstedt and Grade Level IV Deputy District Attorney Carol Najera in retaliation for his opinions and statements relating to a criminal case entitled *People v. Cuskey*. Specifically, plaintiff contends that his opinions and statements relating to the *Cuskey* matter led to the following acts of retaliation by defendants Garcetti, Sundstedt and Najera: (1) plaintiff was removed as a calendar deputy at the Pomona branch and ultimately re-assigned as a filing deputy in El Monte; (2) one of his murder cases was re-assigned to a lesser experienced

prosecutor; (3) he was not assigned any new murder cases; and (4) he was denied a Grade IV Level position.

After amending the complaint two times, plaintiff has set forth the following causes of action: (1) 42 U.S.C. § 1983 claim for alleged violations of plaintiff's First and Fourteenth Amendment rights against Mr. Garcetti, Mr. Sundstedt and Ms. Najera; and (2) state claim for intentional infliction of emotional distress against Mr. Sundstedt and Ms. Najera. Plaintiff's claims against defendants are limited to personal capacity claims.[1] (Second Amended Complaint ["SAC"] 7:17, 8:20.) As more fully set forth below, there are no material facts reasonably in dispute as to the foregoing claims. Rather, this case essentially turns on whether, as a matter of law, plaintiff has engaged in speech warranting the protection of the First Amendment.

II. STATEMENT OF FACTS.

A. Plaintiff's Involvement In The *People v. Cuskey* Matter.

Plaintiff has been employed as a deputy District Attorney with the Los Angeles County District Attorney's Office since 1989. While plaintiff was assigned as the calendar deputy at the Pomona branch, he was approached by a criminal defense attorney, Richard Escobedo, who represented one of the defendants in the case of *People v. Cuskey* which had been assigned to another

[1] Plaintiff's *Monell* claim against the County of Los Angeles and the official capacity claims against the individual defendants were dismissed following this Court's ruling on defendants' Motion for Summary Adjudication.

deputy District Attorney, Steve Gallon. Mr. Escobedo told plaintiff that he believed that the arresting Sheriff's deputies from the Industry Station may have lied in the search warrant affidavit and requested that plaintiff review the case. Plaintiff apparently reviewed the affidavit and other documentary evidence, and concluded that the property described in the affidavit had been mischaracterized. After further investigation, plaintiff discussed the matter with Head Deputy District Attorney Frank Sundstedt and plaintiff's immediate supervisor Carol Najera who purportedly agreed that there was a problem.

After further investigation, plaintiff prepared a memorandum/disposition report on March 2, 2000 setting forth a summary of his investigation, his conclusions that the affidavit was falsified and misleading and his recommendation that the *Cuskey* case be dismissed. Plaintiff sent the memorandum/disposition report to Mr. Sundstedt who was the Head Deputy District Attorney at the Pomona branch. Upon reviewing the memorandum, Mr. Sundstedt agreed that there were problems with the *Cuskey* case but recommended that plaintiff revise the memorandum so that it did not include conclusions and blatant statements accusing the Sheriff's deputies of committing felonious perjuries that had not been proven. After plaintiff omitted those accusatory conclusions from his memorandum, Mr. Sundstedt contacted the appropriate captain at the Sheriff's Department's Industry Station to advise him that he thought there was a problem with the *Cuskey* case and requested a meeting to discuss it.

On March 9, 2000, a meeting was held at Mr. Sundstedt's office attended by a Sheriff's captain and lieutenant, the deputy sheriff who prepared the search warrant affidavit, plaintiff, Mr. Gallon, Mr. Sundstedt and

Ms. Najera. Upon listening to what the deputy sheriff who prepared the search warrant affidavit had to say at the meeting, Mr. Sundstedt believed that the best course of action was to proceed with the Motion to Traverse the Warrant[2] which had already been filed by the defense in the *Cuskey* case so that a neutral judicial officer could hear the testimonies and assess the evidence and make a determination as to whether the search warrant affidavit was falsified, misleading or otherwise improper. Plaintiff did not continue to request the dismissal of the *Cuskey* case after the meeting.

Plaintiff was subpoenaed by the defense in the *Cuskey* case to testify at the Motion to Traverse hearing which was to be heard by Judge David Milton. Plaintiff was the calendar deputy for Judge Milton at that time and had been so for about one year. Plaintiff testified at the Motion to Traverse hearing on March 20, 2000, and the Motion was denied after Judge Milton considered all of the evidence. One of the defendants in the *Cuskey* case was subsequently convicted after a jury trial and the other two defendants entered guilty pleas.

B. Plaintiff's Allegations Of Retaliation.

Plaintiff contends that his opinions and statements relating to the *Cuskey* matter led to the following acts of retaliation by Mr. Sundstedt, Ms. Najera and Mr. Garcetti: (1) plaintiff was removed as a calendar deputy at the Pomona branch and ultimately re-assigned as a filing deputy in El Monte; (2) one of his murder cases

[2] A Motion to Traverse is basically an attack on the credibility of the search warrant affiant. (Exhibit "B," Plaintiff's Depo., 103:10-24.)

was re-assigned to a lesser experienced prosecutor (Mr. Gallon); (3) he was not assigned any new murder cases; and (4) he was denied a Grade IV position. The facts not reasonably in dispute, however, demonstrate that the foregoing employment decisions had nothing to do with the *Cuskey* matter.

(1) Non-Retaliatory Reasons For Re-Assignment To El Monte:

In April 2000, the Pomona branch eliminated two calendar courts. Prior to then, it had four calendar courts, two of which were staffed by Grade IV calendar deputies, and two of which were staffed by Grade III deputies (one of which was plaintiff). Mr. Sundstedt decided that the two remaining calendar courts should have two calendar deputies and plaintiff was thereafter placed as a co-calendar deputy with a Grade IV deputy. Because filing deputy positions were generally difficult to staff, Mr. Sundstedt attempted to rotate deputies through these positions for six-month periods. One of the Grade III deputies had been filling one filing deputy position and it was understood even before the *Cuskey* matter that plaintiff was the next in line to file for a six-month period. However, when it came time for plaintiff to fill that filing deputy position, Mr. Sundstedt became aware of a trial deputy whose pregnancy prevented her continuing to do court duty. As such, she was assigned the filing position, giving plaintiff a reprieve.

In mid-August, 2000, the misdemeanor filings in Pomona were getting behind because there was only a part-time deputy handling them. The fact plaintiff got transferred to be a filing deputy is because he was treated

identically with every other Grade III deputy that Mr. Sundstedt staffed. Moreover, because plaintiff lived in Pomona, Ms. Najera wanted to give plaintiff an option to remain in the Pomona branch and fill the misdemeanor filing vacancy. As such, on August 28, 2000, Ms. Najera gave plaintiff a choice of filing misdemeanors in Pomona, or being transferred to El Monte as a felony-filing deputy. Plaintiff refused to choose because he believed that filing misdemeanors was not suitable for one with his experience and that being transferred to El Monte would require a longer commute. Since plaintiff did not choose, Ms. Najera transferred him to El Monte effective September 5, 2000.

(2) Non-Retaliatory Reasons For Re-assignment Of A Murder Case To A Grade Level II:

As he was in charge of overseeing an entire branch office, Mr. Sundstedt felt it was his duty to ensure that deputies were permitted to handle a homicide case at one point under his supervision. Two Grade II deputies were to be transferred to the Juvenile Division from Pomona shortly and Mr. Sundstedt wanted them to experience the trial of a murder case before their departure. He instructed Ms. Najera to find a suitable murder case for each of the Grade II deputies to try before their departure to Juvenile. Ms. Najera went to all the calendar deputies and gathered a brief synopsis of all murder cases that might be suitable for re-assignment and brought them to the attention of Mr. Sundstedt. One of the murder cases selected by Mr. Sundstedt as being appropriate to be re-assigned to Grade II deputy Steve Gallon was plaintiff's and the other Grade II received a murder case from another Grade III deputy.

(3) Non-Retaliatory Reasons For No Assignment Of New Murder Cases:

The number of new murder cases that would be assigned to trial deputies in the Pomona branch depended on the murder rate in Pomona. Plaintiff was not assigned any new murder cases between the time of the hearing on the Motion to Traverse on the *Cuskey* case on March 20, 2000 and his transfer of plaintiff to El Monte on September 5, 2000 because there were limited murder informations filed in Pomona. There was simply no effort to deprive plaintiff of assignment of murder cases.

(4) Non-Retaliatory Reasons For Denial Of Grade Level IV Position:

Plaintiff, along with about 150 others, was a candidate for limited Grade IV positions in the District Attorney's Office. He was one of ten Grade IIIs from the Pomona branch who was considered promotable based upon his scores from the written exam and appraisal of promotability analysis. As Head Deputy of the Pomona branch, Mr. Sundstedt was responsible for scoring the appraisal of promotability and he gave the same outstanding scores for eight out of the ten Grade III candidates under his supervision. Plaintiff was one of the eight Grade III candidates who received the same outstanding scores on the appraisal of promotability analysis. Of the eight Grade III candidates that Mr. Sundstedt rated equally outstanding, four received the Grade IV promotions. The final decision on which Grade III deputies would be promoted to Grade IV rested with then District Attorney Garcetti, who would receive recommendations from his Chief Deputy.

On August 25, 2000, a total of 44 Grade III deputies were promoted to Grade IV deputies. Other than scoring the appraisal of promotability, the only other involvement that Mr. Sundstedt had in the promotion process was to opine to the Director of the Branch and Area Operations of his top four candidates whom he believed should get the Grade IV position. It turns out that of the four Mr. Sundstedt opined were the most deserving, only two were promoted. While Mr. Garcetti was the final decision-maker on who would be promoted to the limited Grade IV positions, there is simply no evidence that he was even aware of the *Cuskey* matter or plaintiff's involvement in the same prior to his approval of the recommendation list of Gra[d]e IV promotions. As such, there is simply no merit to plaintiff's allegation that he was denied the Grade IV position as a result of his involvement in the *Cuskey* case.

On September 5, 2000, plaintiff filed a Grievance against Mr. Sundstedt and Ms. Najera alleging that they retaliated against him as a result of his reporting that certain officers may have fabricated probable cause to obtain the search warrant in the *Cuskey* case. On October 5, 2000, after a full hearing, the plaintiff's Grievance was denied at the Second Level Hearing. Plaintiff did not appeal this decision or attempt to further pursue his Grievance. Instead, plaintiff filed this instant civil action on October 18, 2000.

III. SUMMARY JUDGMENT IS APPROPRIATE WHEN THERE IS NO ISSUE OF MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Summary judgment must be rendered when there is no genuine issue as to any material fact and the moving

party is entitled to judgment as a matter of law. Federal Rules of Civil Procedure, Rule 56(c); *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). Further, if summary judgment is not granted on the entire action, a court may render partial summary judgment on individual issues as to which there remains no genuine issue of material fact. Federal Rules of Civil Procedure, Rule 56(b), (d).

IV. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY AS TO PLAINTIFF'S FIRST CAUSE OF ACTION BROUGHT UNDER SECTION 1983.

The Supreme Court recently clarified the procedure to be used by the district court in determining whether officials sued in their individual capacities are entitled qualified immunity. *Saucier v. Katz*, 121 S.Ct. 2151 (2001). The court must consider the initial threshold inquiry of whether, taking the facts in the light most favorable to the plaintiff, the defendant/official's conduct violated a constitutional right of the plaintiff. *Id.* at 2156. If not, the qualified immunity analysis ceases and the officials are entitled to immunity. *Id.* If the court determines a constitutional violation has occurred, the court must ask the next question: "whether the right was clearly established" at the time of the violation. *Id.* "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . . " *Id.* Finally, if the court determines that the right was clearly established at the time of the official action, the court must determine whether the conduct of the official was reasonable in light of the clearly established law at the time.

A. Defendants Did Not Violate A Constitutional Right Because Plaintiff's Speech Was Not Protected By The First Amendment.

The inquiry as to whether speech is protected under the First Amendment in a public employment context is a question of law for the court to decide. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). In order for a public employee's speech to be protected under the First Amendment, the employee must first establish that his speech was a matter of public concern. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977). If the employee fails in this initial burden, "it is unnecessary . . . to scrutinize the reasons" for the employer's action. *Connick*, *supra*, 461 U.S. at 146. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

Plaintiff in the instant case has not and cannot establish that his speech was a matter of public concern. Specifically, plaintiff claims that he notified Head Deputy District Attorney Sundstedt in a March 2, 2000 internal memorandum that Los Angeles County Sheriff's Department deputies had engaged in unconstitutional and unlawful misconduct, that the affidavit used to support the issuance of a warrant in the case of *People v. Michael Cuskey* (Case No. KA045491) was false, and that the case against Cuskey should be dismissed. (SAC, ¶13). These statements and opinions are not of public concern. The Ninth Circuit has "acknowledged that a 'narrow, limited focus and [a] limited audience weigh against [a] claim of protected speech.'" *Brewster v. Board of Education*, 149 F.3d 971, 981 (9th Cir. 1998), *cert. denied*,, 526 U.S. 1018 (1999) (quoting *Roe v. City & County of San Francisco*, 109

F.3d 578, 585 (9th Cir. 1997)). Here, plaintiff never notified the media or any officials other than his direct supervisors (i.e., Sundstedt and Najera) regarding the issues contained in the March 2, 2000 memorandum to Mr. Sundstedt. This constitutes a limited focus and limited audience and therefore weighs against a claim of protected speech.

Moreover, to the extent plaintiff criticized the decision of his superiors to pursue the *Cuskey* case despite plaintiff's opinions that the search warrant affidavit was falsified, that also cannot serve the basis of his First Amendment claim. The decision to prosecute a case is at the very core of prosecutorial discretion and is therefore a matter only of internal District Attorney's Office concern. Courts have recognized the need to grant the District Attorney such broad decision making privileges in the institution of absolute prosecutorial immunity.[3] Thus, plaintiff's speech was not a matter of public concern because it was directed only towards internal District Attorney discretionary decision making and prosecutors enjoy absolute immunity for the decision to prosecute. *Burns v. Reed*, 500 U.S. 478, 486 (1991). Thus, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide

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[3] Prosecutors are "absolutely immune from liability under section 1983 for their conduct in 'initiating a prosecution and in presenting the State's case' insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.'" *Burns v. Reed*, 500 U.S. 478, 486 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (internal citations omitted). Prosecutors are immune if the actions of the prosecutor are performed as part of the prosecutor's preparation of his case, even if they are able to be characterized as investigative or administrative. *Freeman v. Hittle*, 708 F.2d 442 (9th Cir. 1983) (per curiam).

latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Myers, supra*, 461 U.S. at 146.

Even assuming, arguendo, plaintiff's speech constituted a matter of public concern, the "*Pickering*" balancing test weighs in favor of defendants. "The 'public concern' prong is a necessary, but not a sufficient, condition of constitutional protection. It merely brings the claim within the 'coverage' of the First Amendment, and thus 'ensures that a court will test the reasons for restriction against first amendment standards.'" *Brewster, supra*, 149 F.3d at 979. This second step requires the court to conduct a *Pickering* balancing test. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick, supra,* 461 U.S. at 148 n.7. In doing so, the court weighs the plaintiff's interest in the protected speech versus the State's interests in ensuring workplace efficiency and avoiding workplace disruption. This balancing test must **clearly** favor the plaintiff in order for a claim of qualified immunity to be defeated. *Lytle v. Wondrash*, 182 F.3d 1083, 1088 (9th Cir. 1999). The Court in *Lytle* held that "we must decide whether the outcome of the *Pickering* balancing test so **clearly** favored [Plaintiff] that it would have been patently unreasonable for the [Defendants] to conclude that their actions were lawful." *Id.* (italics in original, emphasis added).

"In conducting this balancing, courts must give government employers 'wide discretion and control over the management of [their] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.'" *Brewster, supra,* 149 F.3d at 979 (citing *Connick v. Myers*, 461 U.S. 138, 151.)

Moreover, an important factor for the court to consider in the *Pickering* balancing test is "whether the speaker directed the statement to the public or the media, as opposed to a governmental colleague." *Id.*; *see also, Brewster, supra*, 149 F.3d at 978, 981 and *Roe, supra,* 109 F.3d at 585. The Ninth Circuit has held that this factor is extremely important in the analysis: "[a] narrow, limited focus and [a] limited audience weigh against [a] claim of protected speech." *Id.* In this case, as more fully set forth above, plaintiff himself did not feel that his opinions were matters of public concern. Rather, he believed them to be a matter of internal District Attorney's office concern, which is why he confined his opinions to a memorandum to his supervisor. "Speech focused solely on *internal policy and personnel grievances* does not implicate the First Amendment." *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992) (overturned on other grounds) (emphasis added).

Furthermore, in conducting the *Pickering* balancing test, the district court may also consider whether the statement was false or made with reckless disregard of the truth. *Moran v. Washington*, 147 F.3d 839, 849 (9th Cir. 1998); *Brewster*, supra, 149 F.3d. at 981; *Johnson v. Multnomah County*, 48 F.3d. 420, 425 (9th Cir. 1995). In the instant case, contrary to plaintiff's opinions relating to the Cuskey matter, Although plaintiff in this case properly brought his concerns relating to the *Cuskey* matter, in denying the Motion to Traverse, a Superior Court Judge found that the sheriff's deputies did not lie, commit misrepresentations of facts, or omit material facts in their sworn affidavit as suggested by plaintiff. (*See* SAC ¶13). This finding raises the presumption that plaintiff made a false statement or otherwise recklessly disregarded the truth relating to the *Cuskey* matter.

"Although [plaintiff's] untrue speech may not be per se unprotected, the district court's finding of falsity certainly undermines Moran's First Amendment interest for balancing purposes." *Moran v. Washington*, 147 F.3d 839, 849 (9th Cir. 1998) (citing *Johnson v. Multnomah County*, 48 F.3d. 420, 425 (9th Cir. 1995) (internal citation omitted). The same presumption arises in the instant case. Plaintiff had all the evidence that a neutral judicial officer had to consider and disregarded the evidence that the deputies were innocent of plaintiff's accusations against them. Indeed, even though plaintiff testified in the *Cuskey* Motion to Traverse hearing, a judge found as a matter of fact, that plaintiff's observations and investigations simply did not support the conclusion that the search warrant affidavit had been falsified. Thus, as in *Moran*, this finding of falsity substantially weakens any First Amendment protection afforded to plaintiff.

Thus, plaintiff's "speech" was not protected by the First Amendment.

B. The Law Was Not Clearly Established Preventing The Defendants' Actions.

Even assuming, arguendo, plaintiff engaged in protected First Amendment speech, defendants are nevertheless entitled to qualified immunity. Plaintiff bears the burden of proving the rights he alleges to have been violated were clearly established. *Romero v. Kitsop County*, 931 F.2d 624, 627 (9th Cir. 1996). As set forth in detail above, the *Pickering* balancing test does not weigh **clearly** in favor of plaintiff. (*See infra* Part IV.A.) Thus, this court "must determine whether the specific facts of this case present one of those **rare** instances in which

Pickering rights are, despite balancing, clearly established." *Id.* (emphasis added). Courts have recognized that the *Pickering* balancing test will rarely weigh *clearly* in favor of plaintiff. Where the *Pickering* balancing factors do not weigh **clearly** in favor of plaintiff, the law cannot be said to be clearly established. In other words, the court must decide "whether the *Pickering* test so clearly favors [plaintiff] that it would have been unreasonable for the officials to believe that [the adverse employment actions taken against the plaintiff were] lawful." *Id.* at 981.

Here, plaintiff must cite sufficient facts to support the "content-specific, fact-intensive" *Pickering* balancing test in his favor as described by the court in *Moran*. Plaintiff in this case has not and cannot do so. Plaintiff merely suggests that he was subjected to retaliation for pursuing his First Amendment rights. However, "[t]he legal right at issue is not the generic right to free speech. "As the qualified immunity defense has evolved, it provides ample protections to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Defendants here have not blatantly violated plaintiff's First Amendment rights. Indeed, there are *serious* and substantial questions as to whether the Plaintiff's speech even constituted protected speech under the First Amendment. "The central purpose of affording public officials qualified immunity from suit is to protect them from undue interference with their duties and from potentially disabling threats of liability." *Elder v. Holloway*, 510 U.S. 510, 514 (1994) (citations omitted). If defendants are subjected to suit every time they take an administrative employment-related action that happens to be contemporaneous with an employee's speech, their duties will be unduly interfered with and they will be

subjected to potentially disabling threats of liability. This is exactly what qualified immunity seeks to prevent. Therefore, qualified immunity must be granted to all defendants as to plaintiff's section 1983 claim.

C. Defendants' Actions Were Objectively Reasonable Under The Circumstances.

The third and final factor in the determination of whether public officials acting in their individual capacities are entitled to qualified immunity is whether their actions were objectively reasonable under the circumstances. *Saucier*, *supra*, 121 S.Ct. 2151. The Court need only reach this question if it first finds that 1) defendants violated a constitutional right of plaintiff, and 2) that plaintiff's right was clearly established at the time of the violation. *See Id.* at 2156. "[T]he question is whether the [official's] actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Id.* at 2161 (citing *Graham v. Connor*, 490 U.S. 386, 397 (1989)).

All defendants in this case acted objectively reasonably with regard to each of the adverse employment actions plaintiff complains about. First, plaintiff's responsibilities as a calendar deputy were removed not because of plaintiff's speech, but rather, it was the result of the consolidation of the courts in Pomona. Before consolidation, there were four direct calendar courts, one of which plaintiff served as calendar deputy. After consolidation, there were only two calendar courts. This left Mr. Sundstedt with two Grade III calendar deputies (of which plaintiff was one) and two Grade IV calendar deputies to staff only two calendar courts. Because Mr. Sundstedt did not feel it appropriate to remove calendar assignments from any of

the four calendar deputies, he made them all co-calendar deputies.

Secondly, plaintiff's re-assignment to Rio Hondo court in El Monte was not the product of retaliation. Rather, it was necessary to accommodate the filing needs within the Pomona branch that Mr. Sundstedt was responsible for filling. Because filing deputy positions were generally difficult to staff, Mr. Sundstedt attempted to rotate deputies through these positions for six-month periods. One of the Grade III deputies had been filling one filing deputy position and it was understood even before the *Cuskey* matter that plaintiff was the next in line to file for a six-month period. However, when it came time for plaintiff to fill that filing deputy position, Mr. Sundstedt became aware of a trial deputy whose pregnancy prevented her continuing to do court duty. As such, she was assigned the filing position, giving plaintiff a reprieve until mid-August, 2000, when the misdemeanor filings in Pomona were getting behind because there was only a part-time deputy handling them. Mr. Sundstedt's intention was to transfer another part-time deputy from El Monte to handle the misdemeanor filings in Pomona. That would leave only two deputies in El Monte as filing deputies, one of whose duties were limited to filing misdemeanors. Mr. Sundstedt also believed that the Deputy in Charge in El Monte was filing too much and needed to devote more time to supervision of new deputies assigned to that office. As such, he felt that two felony-filing deputies would then be required in El Monte. Since plaintiff was next in line to be rotated into a filing position, Mr. Sundstedt believed that he should be transferred to El Monte as a felony-filing deputy. Mr. Sundstedt thereafter turned over the filing deputy assignments to Ms. Najera, the Assistant Head Deputy

District Attorney of the Pomona branch, as he was going out of town. Because plaintiff lived in Pomona, Ms. Najera wanted to give plaintiff an option to remain in the Pomona branch and fill the misdemeanor filing vacancy. As such, on August 28, 2000, Ms. Najera gave plaintiff a choice of filing misdemeanors in Pomona, or being transferred to El Monte as a felony-filing deputy. Plaintiff refused to choose because he believed that filing misdemeanors was not suitable for one with his experience and that being transferred to El Monte would require a longer commute. Since plaintiff did not choose, Ms. Najera transferred him to El Monte effective September 5, 2000.

Also meritless is plaintiff's claim that one of his murder cases was removed and re-assigned to another deputy district attorney in retaliation for his purported speech. As he was in charge of overseeing an entire branch office, Mr. Sundstedt felt it was his duty to ensure that his deputies were permitted to handle a homicide case at one point under his supervision. Two Grade II deputies were to be transferred to the Juvenile Division from Pomona shortly and Mr. Sundstedt wanted them to experience the trial of a murder case before their departure. He instructed Ms. Najera to find a suitable murder case for each of the Grade II deputies to try before their departure to Juvenile. Ms. Najera found four murder cases that might be suitable for re-assignment and brought them to the attention of Mr. Sundstedt. One of the murder cases selected by Mr. Sundstedt as being appropriate to be re-assigned to a Grade II was plaintiff's and the other Grade II received a murder case from another Grade III deputy. Mr. Sundstedt chose the *Perrin* case, previously assigned to plaintiff, because he believed the nature of the case was

suitable to provide a promising Grade II deputy with experience trying a homicide case.

Equally unsupported by evidence is plaintiff's contention that he was not assigned any new murder cases because of his purported speech. The fact of the matter is, plaintiff was not assigned any new murder cases between the time of the Motion to Traverse hearing on the *Cuskey* matter on March 20, 2000 and his re-assignment to El Monte on September 5, 2000 because there were limited murder informations filed in Pomona during that time. There is simply no evidence of any retaliatory motive on the part of any of the defendants to preclude him from new murder assignments.

Finally, plaintiff's allegation he was denied the Grade IV promotion in retaliation for his purported speech is based purely upon conjecture and speculation on his part. Plaintiff, along with about 150 others, was a candidate for limited Grade IV positions in the District Attorney's Office. He was one of ten Grade IIIs from the Pomona branch that Mr. Sundstedt recommended to be promoted based upon his scores from the written exam and appraisal of promotability analysis. Of the ten candidates, Mr. Sundstedt rated eight equally outstanding, including plaintiff. Four of these eight candidates were actually promoted. The final decision on which Grade III deputies would be promoted to Grade IV rested with then District Attorney Garcetti, who would receive recommendations from his Chief Deputy after the Chief Deputy has meetings and discussions with the Directors of all the branch offices and the three Assistant District Attorneys. While Mr. Garcetti was the final decision-maker on who would be promoted to the limited Grade IV positions, there is simply no evidence that he was even aware of the *Cuskey* matter or plaintiff's

involvement in the same at the time he agreed with the recommendations of his Chief Deputy on the Grade IV promotions.

Simply stated, the material facts not reasonably in dispute all demonstrate the existence of lawful and justified administrative reasons for the adverse employment actions alleged by plaintiff. Therefore, defendants are entitled to qualified immunity from suit.

V. PLAINTIFF'S SECOND CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS WITHOUT MERIT.

Plaintiff's intentional infliction of emotional distress claim is asserted against defendants Sundstedt and Najera only and is apparently based upon their response to plaintiff's statements and opinions relating to the *Cuskey* matter. The elements that plaintiff must prove in order to constitute a valid cause of action for intentional infliction of emotional distress are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001 (1993) (quoting *Christensen v. Superior Court* (Cooperman), 54 Cal. 3d 868, 903 (1991)).

In the instant case, plaintiff has not and cannot satisfy the first two elements of this tort. Furthermore, defendants Sundstedt and Najera are nevertheless entitled to immunity from suit under Government Code § 821.6.

A. The First Element Requiring Outrageous Conduct By Defendants Fails As A Matter Of Law.

"Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, 593 (1979). The "conduct will be found to be actionable where the 'recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'outrageous!'" *KOVR-TV, Inc. v. Superior Court* (Cecchettini), 31 Cal. App. 4th 1023, 1028 (1995) (quoting Rest. 2d Torts, § 46 com. d.).

In the instant case, as more fully set forth above, defendants' Sundstedt and Najera's conduct has been nothing but proper and reasonable in light of their duties and obligations as Head Deputy and Assistant Head Deputy District Attorneys of the Pomona branch, respectively. In other words, their handling of the *Cuskey* matter simply does not rise to the level of actions that exceed the bounds tolerated by a civilized community.

> "Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, **even if improper motivation is alleged**."

Janken v. GM Hughes Electronics, 46 Cal. App. 4th 55, 80 (1996). The court in *Janken* added that "[w]hile it is possible to avoid making personnel decisions on a prohibited discriminatory basis, it is not possible either to avoid making personnel decisions or to prevent the claim that those decisions were discriminatory." *Id.* at 63-64.

Defendants in this case did nothing more than make independent, justifiable personnel decisions regarding plaintiff. It is these purely personnel-related decisions that plaintiff claims are the cause of his emotional distress. However, as noted by the California Court of Appeal, personnel decisions are not outrageous actions even if the motivation behind them is improper. Therefore, despite plaintiff's allegation that the adverse employment actions were taken against him in retaliation for his speech, such conduct, even if true, does not arise to the level of outrageousness required to sustain a cause of action for intentional infliction of emotional distress. For the foregoing reasons, the first element of intentional infliction of emotional distress fails.

B. <u>The Second Element Requiring Plaintiff To Show Severe Or Extreme Emotional Distress Also Fails As A Matter Of Law.</u>

Plaintiff has also failed to prove the second element of the tort, that he has suffered severe or extreme emotional distress. Plaintiff may recover for intentional infliction of emotional distress only when he has, in fact, suffered severe emotional distress. *Girard v. Ball*, 125 Cal. App. 3d 772, 787 (1981). For emotional distress to be severe, "[B]oth the intensity and duration of the emotional distress suffered must be considered in determining its severity. Severe emotional distress means 'emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it.'" *Kiseskey v. Carpenters' Trust for So. California*, 144 Cal. App. 3d 222, 231 (1983) (citing *Fletcher v. Western National Life Ins. Co.*, 10 Cal. App. 3d 376, 397 (1970).) Whether the emotional distress suffered

by plaintiff can be reasonably be found to be severe is a question of law to be initially determined by the trial court. *Fletcher., supra,* 10 Cal.App.3d at p. 397.

In *Bogard v. Employers Casualty Co.*, 164 Cal. App. 3d 602, 617 (1985), the court held that mere allegations that the plaintiff suffers emotional distress without facts indicating the nature or extent of such mental suffering, fails to state a cause of action for intentional infliction of emotional distress. In *Pitman v. City of Oakland*, 197 Cal. App. 3d 1037, 1047-48 (1988), the court held that "[t]he allegation that plaintiff suffered shame, humiliation, and embarrassment without further factual explanation does not meet the requirement of specificity called for in *Bogard*." In the instant case, plaintiff merely alleges that he has suffered emotional distress and mental anguish without stating any facts to show the extent of his mental suffering. (*See*, SAC, ¶ 34). Mere allegations that plaintiff has suffered mental anguish and emotional distress is insufficient as a matter of law to satisfy the requirement of proof necessary for an intentional infliction of emotional distress claim. At most, plaintiff alleges that he has suffered some emotional distress, not that said emotional distress was severe or extreme. Even if plaintiff claimed that the distress he has suffered was severe or extreme, he provides no facts in his Second Amended Complaint to support such a claim, as required by *Michaelian* and *Bogard, supra*. Therefore, the second element of the tort of intentional infliction of emotional distress also fails.

C. Defendants Are Nevertheless Entitled To Immunity Under California Government Code § 821.6.

California Government Code § 821.6 provides as follows:

> "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

It is undisputed that the basis of plaintiff's intentional infliction of emotional distress claim against defendants Sundstedt and Najera arise from their alleged actions and omissions with regard to the *Cuskey* matter. Thus, all actions or omissions taken by these defendants in the investigation and prosecution of the *Cuskey* case are immunized. *See Amylou R. v. County of Riverside*, 28 Cal. App. 4th 1205, 1211 (1994) (§ 821.6 immunity "bars liability for any injury caused by the prosecution of the judicial proceeding, even if the person suffering the injury is not the target of that prosecution.") Thus, even though plaintiff was not the subject of the criminal prosecution in *Cuskey*, defendants are still entitled to immunity against all of plaintiff's claims that arise out of the handling of the *Cuskey* case. For the foregoing reasons, all of plaintiff's allegations of intentional infliction of emotional distress that are related to the handling of the *Cuskey* matter are improper as defendants are completely immune from such tort claims under § 821.6.

VI. CONCLUSION

For the reasons set forth above, defendants Gil Garcetti, Frank Sundstedt and Carol Najera respectfully request that the Court grant their Motion for Summary Judgment against plaintiff in its entirety. Alternatively, defendants request that the Court summarily adjudicate issues in favor of defendants as set forth in the Notice of this Motion.

DATED: December 17, 2001

FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE

By /s/ Cindy S. Lee
Cindy S. Lee
Attorneys for Defendants
GIL GARCETTI, FRANK
SUNDSTEDT, and
CAROL NAJERA

CINDY S. LEE, State Bar No. 168941
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, California 91101-3005
Telephone No. (626) 304-7830
Facsimile No. (626) 795-7460

Attorneys for Defendants
GIL GARCETTI, FRANK SUNSTEDT,
and CAROL NAJERA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive, Defendants.	**Case No. CV 00-11106 AHM (AJWx)** **Honorable A. Howard Matz** **DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW RE MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION** **[Notice Of Motion And Motion For Summary Judgment, Or In The Alternative, Summary Adjudication Of Individual Issues; Memorandum Of Points And Authorities filed concurrently herewith]** Date: January 7, 2001 Time: 10:00 a.m. Court: 14

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

Defendants GIL GARCETTI, FRANK SUNSTEDT, and CAROL NAJERA hereby submit the following Uncontroverted Facts and Conclusions of Law in support of their Motion for Summary Judgment, or in the alternative, Summary Adjudication filed concurrently herewith.

UNCONTROVERTED FACTS

1. Plaintiff has been employed as a deputy District Attorney with the Los Angeles County District Attorney's Office since 1989. (Exhibit "B," Deposition of Richard Ceballos [hereinafter "Plaintiff Depo."], 13:10-12.)

2. While plaintiff was assigned as the calendar deputy at the Pomona branch, plaintiff was approached by a criminal defense attorney, Richard Escobedo, who represented one of the defendants in the case of *People v. Cuskey*, which had been assigned to another deputy District Attorney. (Exhibit "B," Plaintiff Depo., 56:14-19.)

3. Mr. Escobedo told plaintiff that he believed that the arresting Sheriff's deputies from the Industry Station may have lied in the search warrant affidavit and requested that plaintiff review the case. (Exhibit "B," Plaintiff Depo., 56:20-57:2.)

4. Plaintiff apparently reviewed the affidavit and other documentary evidence, and concluded that the property described in the affidavit had been mischaracterized. (Exhibit "B," Plaintiff Depo., 62:25-64:12.)

5. After further investigation, plaintiff discussed the matter with Head Deputy District Attorney Frank Sundstedt and plaintiff's immediate supervisor Carol

Najera who purportedly agreed that there was a problem. (Exhibit "B," Plaintiff Depo., 74:9-23.)

6. On March 2, 2000, plaintiff prepared a memorandum/disposition report setting forth a summary of his investigation and his conclusion that the affidavit was falsified and misleading and his recommendation that the *Cuskey* case be dismissed and sent the memorandum/disposition report to defendant Sundstedt. (Exhibit "B," Plaintiff Depo., 44:13-16, 87:17-88:9; Exhibit "D," Sundstedt Depo., 56:8-12.)

7. Upon reviewing the memorandum, defendant Sundstedt had concerns about the *Cuskey* case but recommended that plaintiff revise the memorandum so that it did not include conclusions and blatant statements accusing the Sheriff deputies of committing felonious perjuries that had not been proven (Exhibit "B," Plaintiff Depo., 88:13-17; Exhibit "D," Sundstedt Depo., 56:8-57:15, 63:7-64:23.)

8. After the memorandum was modified, defendant Sundstedt contacted the appropriate Captain at the Sheriff's Department Industry Station and advised him that he thought there was a problem with the *Cuskey* case and requested a meeting to discuss it. (Exhibit "D," Sundstedt Depo., 57:16-24, 66:5-22.)

9. On March 9, 2000, a meeting was held at Mr. Sundstedt's office attended by a Sheriff's captain, lieutenant, the deputy sheriff who prepared the search warrant affidavit, the plaintiff, Mr. Gallon, and defendants Sundstedt and Najera. (Exhibit "B," Plaintiff Depo., 44:17-20, 55:13-15, Exhibit "D," Sundstedt Depo., 65:3-20.)

10. Upon listening to what the deputy sheriff who prepared the search warrant affidavit had to say at the meeting, Mr. Sundstedt was not sure that a dismissal without an airing of the evidence was the appropriate way to handle the *Cuskey* case, but rather, he believed that the best course of action was to proceed with the Motion to Traverse the warrant which had already been filed by the defense so that a neutral judicial officer could hear the testimonies and assess the evidence and make the call regarding the credibility of the officers.

11. Plaintiff did not continue to request to have the *Cuskey* case dismissed after the March 9, 2000 meeting. (Exhibit "D," Sundstedt Depo., 74:5-8.)

12. Plaintiff was subpoenaed by the defense in the *Cuskey* case to testify at the Motion to Traverse hearing which was to be heard by Judge David Milton. (Exhibit "B," Plaintiff Depo., 114:7-12.)

13. Plaintiff was the calendar deputy for Judge Milton at that time and had been so for about one year. (Exhibit "B," Plaintiff Depo., 46:7-11, 53:14-17, 130:23-131:6.)

14. Plaintiff testified at the Motion to Traverse hearing, and the Motion was denied. (Exhibit "B," Plaintiff Depo., 134:4-10; Exhibit "C," Reporter's Transcript of Plaintiff's Testimony at Motion to Traverse Hearing at 141.)

15. One of the defendants was convicted after trial and the other two defendants entered guilty pleas. (Exhibit "B," Plaintiff Depo., 134:11-18.)

16. Plaintiff contends that his opinions regarding the handling of the *Cuskey* matter led to various acts of

retaliation by defendants Sundstedt and Najera. (Exhibit "A," Second Amended Complaint ¶¶15, 17, 18, & 19; Exhibit "B," Plaintiff Depo., 135:23-136:3.)

17. Plaintiff alleges the first instance of retaliation as a result of his statements and opinions relating to the *Cuskey* matter purportedly occurred right after the meeting with the Sheriff's officials when defendant Sundstedt allegedly told plaintiff that he would no longer be a calendar deputy at the Pomona branch and would be reassigned as a trial deputy. (Exhibit "B," Plaintiff Depo., 45:15-47:14.)

18. Plaintiff alleges the second instance of retaliation as a result of his statements and opinions relating to the *Cuskey* matter allegedly occurred when defendant Najera informed him that one of his murder cases would be re-assigned to a lower level deputy District Attorney. (Exhibit "B," Plaintiff Depo., 141:14-143:1.)

19. Plaintiff also contends that he was not assigned any new murder cases and was denied a Grade IV promotion as a result of his opinions relating to the *Cuskey* case. (Exhibit "B," Plaintiff's Depo. 147:25-148:3, 150:15-16.)

20. In April 2000, the Pomona branch eliminated two calendar courts. Prior to then, it had four calendar courts, two of which were staffed by Grade IV calendar deputies, and two of which were staffed by Grade Level III deputies (one of which was plaintiff). (Exhibit "B," Plaintiff's Depo., 140:13-141:8; Exhibit "D," Sundstedt Depo. 93:19-95:9.)

21. Mr. Sundstedt decided that the two remaining calendar courts should have two calendar deputies and plaintiff was thereafter placed as a co-calendar deputy with a Grade IV deputy, Michael Grossbard. (Exhibit "B,"

Plaintiff's Depo., 136:6-12, 21-137:24; Exhibit "D," Sundstedt Depo., 94:6-95:4.).

22. Because filing deputy positions were generally difficult to staff, Mr. Sundstedt attempted to rotate deputies through these positions for six-month periods. One of the Grade III deputies had been filling one filing deputy position and it was understood even before the *Cuskey* matter that plaintiff was the next in line to file for a six-month period. (Exhibit "D," Sundstedt Depo. 102:15-104:25.)

23. However, when it came time for plaintiff to fill that filing deputy position, Mr. Sundstedt became aware of a trial deputy whose pregnancy prevented her continuing to do court duty. As such, she was assigned the filing position, giving plaintiff a reprieve until mid-August, 2000, when the misdemeanor filings in Pomona were getting behind because there was only a part-time deputy handling them. (Exhibit "D," Sundstedt Depo. 105:1-106:8; Exhibit "F," Najera Depo., 158:16-20, 159:17-160:18.)

24. The fact plaintiff got transferred to be a filing deputy is because he was treated identically with every other Grade III that Mr. Sundstedt had on staff. (Exhibit "D," Sundstedt Depo., 106:4-8.)

25. Because plaintiff lived in Pomona, Ms. Najera wanted to give plaintiff an option to remain in the Pomona branch and fill the misdemeanor filing vacancy. As such, on August 28, 2000, Ms. Najera gave plaintiff a choice of filing misdemeanors in Pomona, or being transferred to El Monte as a felony-filing deputy.

26. However, plaintiff refused to choose because he believed that filing misdemeanors was not suitable for one

with his experience and that being transferred to El Monte would require a longer commute. (Exhibit "B," Plaintiff's Depo., 25:5-14, 23-25.)

27. Since plaintiff did not choose, Ms. Najera transferred him to El Monte effective September 5, 2000. *Id.*

28. As he was in charge of overseeing an entire branch office, Mr. Sundstedt felt it was his duty to ensure that his deputies were permitted to handle a homicide case at one point under his supervision. Two Grade II deputies were to be transferred to the Juvenile Division from Pomona shortly and Mr. Sundstedt wanted them to experience the trial of a murder case before their departure to Juvenile. (Exhibit "B," Plaintiff's Depo., 141:20-25; Exhibit "D," Sundstedt Depo. 97:17-98:10.)

29. He instructed Ms. Najera to find a suitable murder case for each of the Grade II deputies to try before their departure to Juvenile. Ms. Najera went to all the calendar deputies and gathered a brief synopsis of all the pending murder cases that might be suitable for re-assignment and brought them to the attention of Mr. Sundstedt. (Exhibit "F," Najera Depo., 153:13-154:2, 11-14.)

30. One of the murder cases selected by Mr. Sundstedt as being appropriate to be re-assigned to Grade II deputy Steve Gallon was plaintiff's and the other Grade II received a murder case from another Grade III deputy. (Exhibit "D," Sundstedt Depo, 101:16-19; Exhibit "F," Najera Depo., 157:3-18.)

31. Mr. Sundstedt chose the *Perrin* case, previously assigned to plaintiff, because he believed the nature of the case was suitable to provide a promising Grade II deputy

with experience of trying a homicide case. (Exhibit "D," Sundstedt 98:11-100:9.)

32. The number of new murder cases that would be assigned to trial deputies depended on the murder rate in Pomona. (Exhibit "B," Plaintiff's Depo., 148:17-149:1.)

33. Plaintiff was not assigned any new murder cases between the time of the hearing on the Motion to Traverse on the *Cuskey* case on March 20, 2000, and his re-assignment to El Monte on September 5, 2000 because there were limited murder informations filed in Pomona. (Exhibit "D," Sundstedt Depo. 118:5-14.)

34. Plaintiff, along with about 150 others, was a candidate for limited Grade IV positions in the District Attorney's Office. Only 44 Grade IIIs were actually promoted. (Exhibit "D," Sundstedt Depo., 51:12-20; Exhibit "B," attached to Sundstedt Depo.)

35. Plaintiff was one of ten Grade IIIs from the Pomona branch that Mr. Sundstedt recommended to be promoted based upon his scores from the written exam and appraisal of promotability analysis. (Exhibit "D," Sundstedt Depo., 43:7-45:12.)

36. Of the ten candidates, Mr. Sundstedt rated eight equally outstanding, including plaintiff. Four of these eight candidates were actually promoted. (Exhibit "D," Sundstedt Depo. 43:8-11, 45:2-12, 46:12-18.)

37. The final decision on which Grade III deputies would be promoted to Grade IV rested with then District Attorney Garcetti, who would receive recommendations from his Chief Deputy after the Chief Deputy has meetings and discussions with the Directors of all the branch

offices and the three Assistant District Attorneys. (Exhibit "E," Garcetti Depo. 25:13-26:19, 30:15-32:1.)

38. Other than scoring the appraisal of promotability, the only other involvement that Mr. Sundstedt had in the promotion process was to opine to the Director of the Branch and Area Operation of his top three or four candidates whom he believed should get the Grade IV position. (Exhibit "D," Sundstedt Depo., 49:12-50:13.)

39. While Mr. Garcetti was the final decision-maker on who would be promoted to the limited Grade IV positions, there is simply no evidence that he was even aware of the *Cuskey* matter or plaintiff's involvement in the same at the time he agreed with the recommendations of his Chief Deputy on the Grade IV promotions or that his approval with the recommendations had anything to do with plaintiff's purported speech. (Exhibit "D," Sundstedt Depo., 80:11-19; Exhibit "E," Garcetti Depo. 34:14-37:3.)

CONCLUSIONS OF LAW

1. The First Cause of Action is brought under 42 U.S.C. § 1983 and alleges violations of plaintiff's First and Fourteenth Amendment rights against Gil Garcetti, Frank Sundstedt and Carol Najera in their personal capacities only for purported adverse employment actions due to his alleged speech protected under the First Amendment.

2. 42 U.S.C. § 1983 provides in pertinent part:

> "Every **person** who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . " (Emphasis added.)

3. The Supreme Court recently clarified the procedure to be used by the district court in determining whether officials sued in their individual capacities are entitled qualified immunity. *Saucier v. Katz*, 121 S.Ct. 2151 (2001). The court must consider the initial threshold inquiry of whether, taking the facts in the light most favorable to the plaintiff, the defendant/official's conduct violated a constitutional right of the plaintiff. *Id.* at 2156. If not, the qualified immunity analysis ceases and the officials are entitled to immunity. *Id.* If the court determines a constitutional violation has occurred, the court must ask the next question: "whether the right was clearly established" at the time of the violation. *Id.* "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . . " *Id.* Finally, if the court determines that the right was clearly established at the time of the official action, the court must determine whether the conduct of the official was reasonable in light of the clearly established law at the time.

4. The inquiry as to whether speech is protected under the First Amendment in a public employment context is a question of law for the court to decide. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983).

5. In order for a public employee's speech to be protected under the First Amendment, the employee must first establish that his speech was a matter of public

concern. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977). If the employee fails in this initial burden, "it is unnecessary . . . to scrutinize the reasons" for the employer's action. *Connick, supra*, 461 U.S. at 146.

6. "[A] 'narrow, limited focus and [a] limited audience weigh against [a] claim of protected speech.'" *Brewster v. Board of Education*, 149 F.3d 971, 981 (9th Cir. 1998), *cert. denied*, 526 U.S. 1013 (1999) (quoting *Roe v. City & County of San Francisco*, 109 F.3d 578, 585 (9th Cir. 1997)).

7. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Myers, supra*, 461 U.S. at 146.

8. "The 'public concern' prong is a necessary, but not a sufficient, condition of constitutional protection. It merely brings the claim within the 'coverage' of the First Amendment, and thus 'ensures that a court will test the reasons for restriction against first amendment standards.'" *Brewster, supra*, 149 F.3d at 979.

9. This second step requires the court to conduct a *Pickering* balancing test wherein the court weighs the plaintiff's interest in the protected speech versus the State's interests in ensuring workplace efficiency and avoiding workplace disruption. This balancing test must **clearly** favor the plaintiff in order for a claim of qualified immunity to be defeated. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick, supra,* 461 U.S. at 148 n.7; *Lytle v. Wondrash*, 182 F.3d 1083, 1088 (9th Cir. 1999).

10. "In conducting this balancing, courts must give government employers 'wide discretion and control over the management of [their] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.'" *Brewster, supra,* 149 F.3d at 979 (citing *Connick v. Myers*, 461 U.S. 138, 151.)

11. Moreover, an important factor for the court to consider in the *Pickering* balancing test is "whether the speaker directed the statement to the public or the media, as opposed to a governmental colleague." *Id.*; *see also, Brewster, supra*, 149 F.3d at 978, 981and *Roe, supra,* 109 F.3d at 585.

12. "Speech focused solely on *internal policy and personnel grievances* does not implicate the First Amendment." *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992) (overturned on other grounds) (emphasis added).

13. In conducting the *Pickering* balancing test, the district court may also consider whether the statement was false or made with reckless disregard of the truth. *Moran v. Washington*, 147 F.3d 839, 849 (9th Cir. 1998); *Brewster*, supra, 149 F.3d. at 981; *Johnson v. Multnomah County*, 48 F.3d. 420, 425 (9th Cir. 1995).

14. Plaintiff bears the burden of proving the rights he alleges to have been violated were clearly established. *Romero v. Kitsop County*, 931 F.2d 624, 627 (9th Cir. 1996).

15. "As the qualified immunity defense has evolved, it provides ample protections to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

16. "The central purpose of affording public officials qualified immunity from suit is to protect them from undue interference with their duties and from potentially disabling threats of liability." *Elder v. Holloway*, 510 U.S. 510, 514 (1994) (citations omitted).

17. The elements that plaintiff must prove in order to constitute a valid cause of action for intentional infliction of emotional distress are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001 (1993) (quoting *Christensen v. Superior Court* (Cooperman), 54 Cal. 3d 868, 903 (1991)).

18. "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, 593 (1979). The "conduct will be found to be actionable where the 'recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "outrageous!"'" *KOVR-TV, Inc. v. Superior Court* (Cecchettini), 31 Cal. App. 4th 1023, 1028 (1995) (quoting Rest. 2d Torts, § 46 com. d.).

19. "Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, **even if improper motivation is alleged**."

Janken v. GM Hughes Electronics, 46 Cal. App. 4th 55, 80 (1996).

20. Plaintiff may recover for intentional infliction of emotional distress only when he has, in fact, suffered severe emotional distress. *Girard v. Ball*, 125 Cal. App. 3d 772, 787 (1981).

21. For emotional distress to be severe, "[B]oth the intensity and duration of the emotional distress suffered must be considered in determining its severity. Severe emotional distress means 'emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it.'" *Kiseskey v. Carpenters' Trust for So. California*, 144 Cal. App. 3d 222, 231 (1983) (citing *Fletcher v. Western National Life Ins. Co.*, [1]0 Cal. App. 3d 376, 397 (1970).)

22. Whether the emotional distress suffered by plaintiff can be reasonably be found to be severe is a question of law to be initially determined by the trial court. *Fletcher., supra,* 10 Cal.App.3d at p. 397.

23. Mere allegations that the plaintiff suffers emotional distress without facts indicating the nature or extent of such mental suffering, fails to state a cause of action for intentional infliction of emotional distress. *Bogard v. Employers Casualty Co.*, 164 Cal. App. 3d 602, 617 (1985); "The allegation that plaintiff suffered shame, humiliation, and embarrassment without further factual explanation does not meet the requirement of specificity called for in *Bogard*." *Pitman v. City of Oakland*, 197 Cal. App. 3d 1037, 1047-48 (1988).

24. "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." California Government Code § 821.6.

25. California Government Code § 821.6 immunity "bars liability for any injury caused by the prosecution of the judicial proceeding, even if the person suffering the injury is not the target of that prosecution." *Amylou R. v. County of Riverside*, 28 Cal. App. 4th 1205, 1211 (1994).

DATED: December 17, 2001.

FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE

By /s/ Cindy S. Lee
Cindy S. Lee
Attorneys for Defendants
GIL GARCETTI,
FRANK SUNSTEDT and
CAROL NAJERA

[Proof Of Service Omitted In Printing]

(10)

No. 04-473

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In The Supreme Court of the United States

GIL GARCETTI, FRANK SUNDSTEDT, CAROL NAJERA and COUNTY OF LOS ANGELES

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX VOLUME II OF III (Pages 195-379)

CINDY S. LEE
Counsel of Record
JIN S. CHOI
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Telephone (818) 545-1925
Facsimile (818) 545-1937

Counsel for Petitioners

BONNIE I. ROBIN-VERGEER
Counsel of Record
SCOTT L. NELSON
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
Telephone (202) 588-1000
Facsimile (202) 588-7795

Counsel for Respondent

Petition For Certiorari Filed October 1, 2004
Certiorari Granted February 28, 2005

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[2] These documents are derived from excerpts of Deposition Transcript of Defendant Frank Sundstedt in the District Court record at R. 37, 43, and 45.

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CINDY S. LEE, State Bar No. 168941
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, California 91101-3005
Telephone No. (626) 304-7830
Facsimile No. (626) 795-7460

Attorneys for Defendants
GIL GARCETTI, FRANK SUNDSTEDT,
and CAROL NAJERA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive, Defendants.	) Case No.) CV 00-11106 AHM (AJWx)) Honorable A. Howard Matz) **DECLARATION OF CINDY S. LEE AND EXHIBITS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF INDIVIDUAL ISSUES** Date: January 7, 2002 Time: 10:00 a.m. Courtroom: 14 [Notice of Motion and Motion for Summary Judgment/ Summary Adjudication; Statement of Uncontroverted Facts and Conclusions of Law; and Proposed Judgment filed concurrently herewith]

Defendants GIL GARCETTI, CAROL NAJERA and FRANK SUNDSTEDT submit the following Declaration of Cindy S. Lee and exhibits in support of their Motion for Summary Judgment, or in the alternative, for Summary Adjudication.

DATED:
December 17, 2001

FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE

By /s/ Cindy S. Lee
Cindy S. Lee
Attorneys for Defendants GIL GARCETTI, FRANK SUNDSTEDT, and CAROL NAJERA

DECLARATION OF CINDY S. LEE

I, Cindy S. Lee, declare as follows:

1. I am an attorney at law, duly licensed to practice before this Court and all of the courts of the State of California, and am a partner of the law firm of Franscell, Strickland, Roberts & Lawrence, attorneys of record for defendants Gil Garcetti, Frank Sundstedt and Carol Najera in the above-captioned action. The matters stated herein are within my personal knowledge and, if duly sworn, I could and would competently testify thereto.

2. Attached hereto as Exhibit "A" is a true and correct copy of plaintiff Richard Ceballos' Second Amended Complaint for Damages and Injunctive Relief.

3. Attached hereto as Exhibit "B" is a true and correct copy of the cover page and referenced pages of the deposition transcript of plaintiff Richard Ceballos.

4. Attached hereto as Exhibit "C" is a true and correct copy of the reporter's transcript of plaintiff Richard Ceballos' testimony at the Motion to Traverse hearing in the case of *People v. Cuskey*, Case No. KA045491, conducted on March 20, 2000.

5. Attached hereto as Exhibit "D" is a true and correct copy of the cover page and referenced pages of the deposition of defendant Frank Sundstedt.

6. Attached hereto as Exhibit "E" is a true and correct copy of the cover page and referenced pages of the deposition of defendant Gil Garcetti.

7. Attached hereto as Exhibit "F" is a true and correct copy of the cover page and referenced pages of the deposition of defendant Carol Najera.

8. This Motion is made following my unsuccessful attempt to meet and confer pursuant to Local Rule 7.4.1 several times shortly after October 24, 2001. Attached hereto as Exhibit "G" is a true and correct copy of the meet and confer letter faxed to plaintiff's counsel on October 24, 2001.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 17th day of December, 2001, at Pasadena, California.

/s/ Cindy S. Lee
Cindy S. Lee

EXHIBIT "C"

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. EA "E" HON. DAVID S. MILTON, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA)
PLAINTIFF,)
VS.) NO. KA045491
MICHAEL CHARLES CUSKEY, RANDY LONGORIA,)
DEFENDANT.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(1538.5 MOTION)
MARCH 20, 2000

APPEARANCES:

FOR THE PEOPLE: GIL GARCETTI, DISTRICT ATTORNEY
BY: CAROL NAJERA, DEPUTY
400 CIVIC CENTER PLAZA, STE 201
POMONA, CALIFORNIA 91766

FOR DEFENDANT CUSKEY: GEOFFREY POPE, ESQUIRE

FOR DEFENDANT LONGORIA: RICHARD ESCOBEDO, ESQUIRE

SHARON BAKER FOX, CSR NO. 4332
OFFICIAL REPORTER

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(RESUMED)	22			
		N-28	31	
		P-34		
(FURTHER)			38	
WALL, KEITH	41	N-54		
		P-56		
SIMPKINS, MURRAY	58	P-66		
WALL, KEITH			70	P-74
CEBALLOS, RICHARD	90	P-94		
		N-96		
(RESUMED)		P-99		

LEGEND

N = MS. NAJERA

P = MR. POPE

[1] POMONA, CALIFORNIA;
MONDAY, MARCH 20, 2000

11:00 A.M.

DEPARTMENT NO. EA "E" HON. DAVID S. MILTON, JUDGE

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APPEARANCES:

THE DEFENDANT CUSKEY PRESENT IN COURT AND REPRESENTED BY COUNSEL, GEOFFREY POPE, ESQUIRE; THE DEFENDANT LONGORIA PRESENT IN COURT AND REPRESENTED BY COUNSEL, RICHARD ESCOBEDO, ESQUIRE; CAROL NAJERA, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA, THE FOLLOWING PROCEEDINGS WERE HELD.

(SHARON BAKER FOX, CSR NO. 4332, OFFICIAL REPORTER.)

THE COURT: CUSKEY, LONGORIA, OJALA.

MATTER HERE FOR CUSKEY AND LONGORIA, IS THAT CORRECT?

MS. NAJERA: THAT'S MY UNDERSTANDING.

THE COURT: AND OJALA HAD BEEN SENTENCED AND NOW RELEASED?

MS. NAJERA: THAT'S ALSO MY UNDERSTANDING, YOUR HONOR.

MS. NAJERA: AT THE PEOPLE'S REQUEST, YEAH.

THE COURT: ALL RIGHT.

[2] MR. OJALA, YOU MAY HAVE A SEAT.

IS THERE SOME REASON WHY MR. OJALA IS HERE?

MS. NAJERA: YOUR HONOR, I THINK WHEN MR. CEBALLOS FIRST LOOKED AT THIS, HE THOUGHT SOMETHING, DEPENDING ON THE OUTCOME OF THIS, HE WOULD WANT MR. OJALA TO BE SOMEHOW AFFECTED BY IT ALL, BUT I'M NOT QUITE SURE. BUT I AGREE WITH HIS ANALYSIS OF THE WHOLE SITUATION, SO I THINK WE CAN JUST HAVE HIM HERE AND PUT ON THE MOTION AND SEE HOW THIS ALL KIND OF PANS OUT.

THE COURT: HAVE A SEAT, MR. OJALA, IN THE SPECTATOR SECTION OF THE COURTROOM.

ALL RIGHT.

MATTERS OF CUSKEY AND LONGORIA. APPEARANCES, PLEASE.

MR. ESCOBEDO: RICHARD ESCOBEDO APPEARING FOR MR. RANDY LONGORIA, PRESENT OUT OF CUSTODY.

MR. POPE: GEOFFREY POPE FOR DEFENDANT CUSKEY. HE'S BEFORE THE COURT ON BOND.

MS. NAJERA: CAROL NAJERA FOR THE PEOPLE, YOUR HONOR.

THE COURT: ALL RIGHT.

THE MATTER IS HERE. WE HAVE HELD SEVERAL MOTIONS. STILL REMAINING IS THE 1538.5, MOTION TO QUASH, SEVER AND TRAVERSE.

IS THAT RIGHT?

MS. NAJERA: THAT'S MY UNDERSTANDING.

[3] MR. ESCOBEDO: YES.

THE COURT: READY TO PROCEED?

MR. ESCOBEDO: YES.

THE COURT: ALL RIGHT.

MR. POPE: YOUR HONOR, ON BEHALF OF CUSKEY, WE WOULD JOIN IN CO-DEFENDANT'S MOTION. AND I BELIEVE THEY ARE JOINING OURS. IN ESSENCE, IT IS A MOTION TO TRAVERSE.

THE COURT: ALL RIGHT.

MS. NAJERA: AND WE'RE PREPARED TO GO FORWARD ON THAT TODAY, YOUR HONOR.

THE COURT: ALL RIGHT.

YOU MAY BE SEATED, COUNSEL. OR YOU MAY STAND, WHATEVER.

THE BAILIFF: IF I COULD REMOVE SOME OF THESE BAGS, WE COULD GET SOME SEATS HERE. THERE ARE BIG SUITCASES HERE.

(PAUSE.)

THE COURT: ALL RIGHT.

THE COURT HAS READ THE MOTION TO TRAVERSE, POINTS AND AUTHORITY AND THE SEARCH WARRANT AND AFFIDAVIT AND ATTACHMENTS.

ARGUMENT.

MS. NAJERA: COUNSEL, IF YOU ARE GOING TO SUBMIT ON YOUR MOVING PAPERS?

[4] MR. ESCOBEDO: NO, I'M NOT GOING TO SUBMIT

I DO HAVE UNDER SUBPOENA SEVERAL DEPUTIES THAT WERE INVOLVED IN THE SEARCH WARRANT, YOUR HONOR. I'D LIKE TO HAVE THEM CALLED AS WITNESSES ON THIS MATTER.

THE COURT: WHAT'S THE OFFER OF PROOF?

IT'S WHAT'S CONTAINED IN THE SEARCH WARRANT, RIGHT?

MR. ESCOBEDO: WELL, IN MY MOVING PAPERS, YOUR HONOR, UNDER AUTHORITY OF 1539, I'M REQUESTING A SPECIAL HEARING BEFORE THIS COURT IN ORDER TO HEAR THE EVIDENCE REGARDING WHETHER THE ISSUES AND MATERIAL INVOLVED IN THE AFFIDAVIT WERE TRUE, IN FACT, OR MISSTATEMENT OR OMISSIONS. I'M ASKING THAT DEPUTIES BE CALLED TO TESTIFY, TO BRING IN EVIDENCE THAT, IN FACT, MATERIAL IN THE AFFIDAVIT WAS NOT CORRECT, WAS, IN FACT, FALSE, AND THERE WAS SOME MATERIAL OMISSIONS.

THE COURT: LIKE WHAT?

MR. ESCOBEDO: WELL, FIRST OF ALL, YOUR HONOR, REGARDING THE LOCATION OF THE STOLEN VEHICLE, IN THE COMPLAINT REPORT AS WELL AS THE VEHICLE REPORT, WHICH WERE FILLED OUT BY THE ARRESTING – OR THE DEPUTIES, THEY INDICATE THAT THE STOLEN VEHICLE WAS FOUND AT 241 THIRD STREET, WHICH IS ABOUT 80 TO A HUNDRED FEET DOWN THE STREET FROM THIS DRIVEWAY.

[5] OFFICER WALL IN HIS AFFIDAVIT BEFORE THE MAGISTRATE INDICATED THAT THE STOLEN VEHICLE WAS LOCATED ACROSS THE STREET FROM 214 THIRD STREET, WHICH IS DIRECTLY IN FRONT OF THIS ALLEYWAY OR DRIVEWAY OR ROADWAY.

FURTHERMORE, THERE IS –

THE COURT: YOU THINK – YOU DON'T THINK THERE WAS A TRANSPOSITION OF THE NUMBERS, 214, 241?

MR. ESCOBEDO: NO, I DON'T, YOUR HONOR.

THE COURT: ALL RIGHT.

WHY DO YOU THINK THAT?

MR. ESCOBEDO: BECAUSE OFFICERS SPITULSKI AND SIMPKINS WERE THE OFFICERS WHO ORIGINALLY INVESTIGATED. THEY PUT DOWN THE CORRECT INFORMATION AS 241.

NOW, IF AN OFFER- – OFFICER WALL – DEPUTY WALL INDICATED 214. NOW, IF HE – HE ALSO INDICATED THAT BECAUSE OF THE CLOSE PROXIMITY

TO THE ENTRANCE TO THIS ROADWAY, THE DEPUTIES WERE ABLE TO FOLLOW THE TIRE TRACKS. THAT'S INCORRECT, YOUR HONOR. HE DELIBERATELY PUT 214 RATHER THAN 241 BECAUSE THAT IS MORE CONVENIENT AND WOULD SUPPORT HIS THEORY THAT TIRE TRACKS LEAD OUT OF THIS ROADWAY.

SPITULSKI AND SIMPKINS HAD THE POSITION CORRECT, PUT IT, DOWN AS 241.

THE COURT: PEOPLE'S RESPONSE?

MS. NAJERA: YOUR HONOR, I THINK IT IS A TYPOGRAPHICAL ERROR. AND, QUITE FRANKLY, IT DOESN'T [6] STATE – IN THE AFFIDAVIT, IT SAYS THAT THE TRUCK WAS PARKED ON THE STREET ACROSS FROM –

THE COURT: WHY DON'T YOU DRAW US TO THE ATTACHMENT, PAGE NUMBER AND LINE.

MS. NAJERA: CERTAINLY, YOUR HONOR.

WE'RE TALKING ABOUT ATTACHMENT PAGE NO. 5, ON LINES 22 TO 24.

THE COURT: ALL RIGHT.

MS. NAJERA: BASICALLY, WHAT OFFICER WALL SAYS IS THAT HE DISCOVERED A WHITE PICKUP – A WHITE CHEVROLET PICKUP TRUCK PARKED ON THE STREET ACROSS FROM 214 THIRD STREET AND BASSET.

THAT I CONTEND, YOUR HONOR –

THE COURT: THAT'S DEPUTY SIMPKINS AND SPITULSKI?

MS. NAJERA: THIS IS WHAT DEPUTY WALL STATED DEPUTY SIMPKINS AND DEPUTY SPITULSKI TOLD HIM.

THE COURT: RIGHT.

MS. NAJERA: YOUR HONOR, I MAINTAIN THAT IS A TYPOGRAPHICAL ERROR, AND HAD IT BEEN ACCOMPANIED BY FURTHER STATEMENTS THAT THE ADDRESS WAS ACROSS THE STREET AND IMMEDIATELY ADJACENT TO THIS DRIVEWAY OR WORDS TO THAT EFFECT, THEN I CAN UNDERSTAND COUNSEL'S CONCERN THAT THERE WAS A MISSTATEMENT. BUT ALL IT STATES IS SIMPLY WHERE IT WAS FOUND AND WITHOUT ANY MORE OF A COMMENT SUCH AS COUNSEL HAS ADDED THAT – A COMMENT, IT'S DOWN THE [7] STREET 80 YARDS.

HE DOESN'T PUT IT CLOSE TO THE DRIVEWAY. HE DOESN'T PUT IT ANYWHERE NEAR – HE DOESN'T MAKE A REPRESENTATION THAT IT WAS CLOSER TO THE DRIVEWAY THAN IT REALLY WAS. HE SIMPLY PUTS THE ADDRESS WHERE WAS IT FOUND.

AND I THINK IT WAS TRANSPOSED, AND I THINK WITHOUT THOSE STATEMENTS – AND COUNSEL IS KIND OF RELYING ON THOSE STATEMENTS AND ADDING THEM WHEN HE HAS, BECAUSE HE DID, IN FACT, DO THAT RIGHT NOW.

MR. ESCOBEDO: YOUR HONOR, I HAVE A VIDEO WHICH INDICATES – AND PHOTOGRAPHS

WHICH INDICATE THERE IS NO SUCH ADDRESS AS 214. ON THE CURB MARKERS, THERE IS A 210 AND 220. THEN THE MOUTH TO THIS ROADWAY ON THE OTHER SIDE IS 222. NO 214.

THE COURT: OKAY.

MR. ESCOBEDO: AND I WOULD LIKE TO HAVE DEPUTY WALL TESTIFY IF IT'S A TRANS – EITHER TRANSPOSED OR IT'S A MISTAKE, LET HIM TESTIFY.

AND I'D LIKE SIMPKINS AND SPITULSKI TO THEN TESTIFY THAT THE CORRECT ADDRESS WAS 241. THEY CAN IDENTIFY THROUGH THE VIDEO WHERE THE VEHICLE WAS FOUND. AND I BELIEVE THAT IS A MATERIAL FACT.

THE COURT: ALL RIGHT.

MR. ESCOBEDO: IF IT'S FOUND DOWN THE ROAD, THEN THE LIKELIHOOD THAT TIRE TRACKS WERE ABLE TO BE FOLLOWED FROM 241 IS VERY, VERY [8] UNLIKELY, IMPROBABLE.

THE COURT: ALL RIGHT.

YOU MAY CALL YOUR FIRST WITNESS.

MR. ESCOBEDO: YOUR HONOR, I'D LIKE TO CALL OFFICER SPITULSKI.

DANIEL SPITULSKI, CALLED AS A WITNESS ON BEHALF OF DEFENDANT LONGORIA, WAS SWORN AND TESTIFIED AS FOLLOWS:

THE CLERK: WOULD YOU RAISE YOUR RIGHT HAND TO BE SWORN, PLEASE.

YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

THE WITNESS: I DO.

THE CLERK: PLEASE STEP FORWARD AND BE SEATED.

MR. ESCOBEDO: YOUR HONOR, THERE WILL BE A MOTION TO EXCLUDE ALL OTHER WITNESSES.

THE COURT: ALL RIGHT. GRANTED.

THE CLERK: STATE AND SPELL YOUR FULL NAME FOR THE RECORD, PLEASE.

THE WITNESS: MY NAME IS DANIEL SPITULSKI. SPELLING IS S-P-I-T-U-L-S-K-I.

THE CLERK: THANK YOU.

[9] THE COURT: YOU READY TO PROCEED?

WHAT'S THE CONTEMPLATED ESTIMATION OF THIS CASE?

MR. ESCOBEDO: THIRTY MINUTES, YOUR HONOR. WE HAVE FOUR WITNESSES.

MS. NAJERA: YOUR HONOR, ON THE ISSUE OF – OF THE ADDRESS, 241 THIRD STREET, APPARENTLY, IS THE ONLY SHOWING COUNSEL HAS MADE AS TO THE DIRECT CONSCIOUS DISREGARD OF THE FACTS. MY UNDERSTANDING FROM THEIR MOVING PAPERS, FROM THE LAW AND HOW WE ALL

KIND OF ENVISION THIS, FOR THEM TO BE ENTITLED TO A HEARING, THEY HAVE TO MAKE A PRELIMINARY SHOWING OF SOME TRULY STANDARD OF RECKLESS DISREGARD FOR THE TRUTH OR TRUE MATERIAL OMISSION. I CONTEND TO THE COURT THAT IF THEIR ONLY DISREGARD OF THE FACT, THE ONLY MISTAKE THEY FIND HERE IS A TRANSPOSED NUMBER, THAT, THAT DOESN'T MEET THE FRANKS STANDARD.

THE COURT: WELL, BUT HE'S SAYING IT'S NOT A TRANSPOSED NUMBER. HE'S SAYING THE ADDRESS DOESN'T EVEN EXIST, 214 DOESN'T EVEN EXIST. SO WE WILL HEAR ABOUT THAT.

MS. NAJERA: OKAY. JUST SO WE UNDERSTAND THAT'S WHAT WE ARE LIMITING THIS INQUIRY TO.

MR. ESCOBEDO: NO, YOUR HONOR, IN MY MOVING PAPERS, I INDICATED SEVERAL OTHER FACTORS WHICH I BELIEVE WOULD CAUSE THIS SEARCH WARRANT TO BE FOUND TO BE INVALID. I ALSO INDICATED THE ISSUE OF THE TIRE TRACKS. I ALSO INDICATED THE –

[10] THE COURT: WELL, WHAT ISSUE OF TIRE TRACKS?

MR. ESCOBEDO: WHETHER OR NOT TIRE TRACKS COULD, IN FACT, BE MADE ON THIS TYPE OF MATERIAL AND WHETHER THEY COULD BE FOLLOWED FOR 300 FEET FROM THE POINT OF THE DEFENDANT'S PROPERTY TO THE –

THE COURT: OKAY.

WELL, WE'RE NOT GOING TO SPEND A GREAT DEAL OF TIME ON THAT.

WHAT'S YOUR NEXT ONE?

MR. ESCOBEDO: ALSO THE FACT THE DEPUTY OBSERVED THREE WHEELS ON THE OTHER SIDE OF THIS FENCE, THE DEFENDANT'S PROPERTY. THEY FAILED TO INCLUDE IN THE AFFIDAVIT THAT NOT ONLY WERE THERE THREE WHEELS, BUT THERE WERE APPROXIMATELY 300 WHEELS.

THE COURT: I READ THAT IN YOUR PAPER, AND MY – THE QUESTION TO ME IS SO WHAT? AS SOON AS I READ THAT, SO WHAT THAT THERE ARE OTHER WHEELS?

MR. ESCOBEDO: THE IMPRESSION THAT WAS GIVEN IN THE AFFIDAVIT IS THAT YOU HAVE AN EMPTY LOT, FIRSTLY.

THE COURT: THAT WASN'T THE IMPRESSION AT ALL THAT THE COURT WAS GIVEN WHEN THE COURT READ THIS AFFIDAVIT.

I'M NOT GOING TO SPEND A GREAT DEAL OF TIME ON THAT EITHER.

WHAT'S YOUR NEXT POINT?

[11] MR. ESCOBEDO: THE FACT THAT THE OFFICERS WHEN THEY EXECUTED THE SEARCH WARRANT BROUGHT ALONG A DRUG SNIFFING DOG. IN THE AFFIDAVIT –

THE COURT: COMPLETELY IMMATERIAL TO THIS TYPE OF PROCEEDING.

MR. ESCOBEDO: IN THE AFFIDAVIT, THERE WAS NO MENTION WHATSOEVER OF A POSSIBILITY OF DRUGS WOULD BE FOUND AT THE LOCATION.

THE COURT: AND THE RESPONSE WOULD BE, SO WHAT AGAIN. NOT BEING DISCOURTEOUS, BUT THAT WOULD BE ANYONE'S RESPONSE IN READING THIS CASE. SO WHAT?

MR. ESCOBEDO: IT GOES TO BAD FAITH, YOUR HONOR. IT SHOWS –

THE COURT: WE'RE NOT GOING TO SPEND A GREAT DEAL OF TIME ON THAT. SO FAR, THE COURT HAS AN ADDRESS OF 214 AND 241. AND YOU ARE SUGGESTING THERE IS NO 214 AND THAT'S SUFFICIENT TO WARRANT THE HEARING. OTHER THAN THAT, THERE IS NOTHING HERE.

MR. ESCOBEDO: ALSO, I INDICATE IN MY MOVING PAPERS OTHER ISSUES I WOULD LIKE TO ADDRESS.

THE COURT: LET'S HEAR THEM.

MR. ESCOBEDO: THE TIRE TRACKS. THE OFFICER WILL VIEW SOME VIDEO AS WELL AS PHOTOGRAPHS INDICATING NO WAY CAN TIRE TRACKS BE FOLLOWED.

I HAVE DEPUTY CEBALLOS UNDER SUBPOENA, WHO WILL TESTIFY AS TO CONDITION OF THE ROADWAY AND WHETHER OR NOT TIRE TRACKS COULD BE FOLLOWED FROM WHEREVER THE STOLEN VEHICLE WAS UP TO [12] THE DEFENDANT'S PROPERTY. THE PHOTOGRAPHS AND VIDEO

ARE GRAPHIC EVIDENCE CONTRARY TO WHAT IS FOUND IN THE AFFIDAVIT.

THE COURT: OKAY. WELL, THERE MAY BE SOME LIMITED TESTIMONY IN THAT REGARD, BUT I JUST DON'T – I'M SURE THERE ARE SURFACES WHERE THE TIRE TRACKS WERE VISIBLE.

AND THERE IS SOME TESTIMONY OR SOME INFORMATION IN THE AFFIDAVIT ABOUT ATTEMPTING TO OBLITERATE CERTAIN TRACKS FROM AREAS – FROM AREAS WHERE TIRE IMPRESSIONS COULD HAVE MADE. AND I'M SURE THERE COULD HAVE BEEN SURFACES OVER WHICH THE VEHICLE MAY HAVE TRAVERSED WHERE MAYBE TIRE TRACKS COULD HAVE BEEN LEFT OR COULDN'T. BUT THAT'S NOT GOING TO CAUSE THIS COURT TO SPEND THE NEXT HALF HOUR IN EXAMINATION BECAUSE IT'S JUST NOT THAT MATERIAL TO THIS TYPE OF HEARING.

WHAT IS MATERIAL IS YOUR ASSERTION NOW THERE IS NO 214. AND THAT'S WHY WE'RE HERE.

MR. ESCOBEDO: WELL, MY ARGUMENT IS GOING TO GO BEYOND THAT, YOUR HONOR.

I'M NOT GOING TO BE – WITH THE COURT'S PERMISSION – NOT JUST LIMITED TO THAT ARGUMENT BECAUSE THERE IS NUMEROUS PROBLEMS WITH THE SEARCH WARRANT, ONE OF WHICH IS THE ADDRESS.

THE COURT: ALL RIGHT.

WHERE ARE THE PARTIES ON THE TRIAL? I WANT TO KNOW WHETHER WE'RE GOING FORWARD OR NOT. I [13] NEED TO KNOW THAT.

MS. SANTINI: I'LL GO LOOK FOR MR. MARQUEZ.

THE COURT: ALL RIGHT.

(PAUSE.)

THE COURT: ALL RIGHT. YOU MAY PROCEED WITH YOUR QUESTIONING.

DIRECT EXAMINATION

BY MR. ESCOBEDO:

Q OFFICER – DEPUTY SPITULSKI, DIRECTING YOUR ATTENTION TO AUGUST 3RD, 1999, AT APPROXIMATELY 8:30 A.M., YOU RECALL WHERE YOU WERE?

A YES.

WE WERE IN THE VICINITY OF BASSETDALE AND PROCTOR AVENUE.

I'M SORRY. BASSETDALE. THIRD STREET. THIRD AVENUE AND PROCTOR AVENUE.

THE COURT: THIRD AND WHAT?

THE WITNESS: I BELIEVE IT'S THIRD AND PROCTOR IN THE COUNTY AREA OF BASSET.

Q BY MR. ESCOBEDO: AND WERE YOU WITH ANYBODY AT THAT TIME?

A YES, MY PARTNER, DEPUTY SIMPKINS.

Q DID YOU NOTICE ANYTHING UNUSUAL AT [14] THAT DATE AND TIME?

A YES.

NORTH OF THE LOCATION, WE OBSERVED A WHITE, APPEARED TO BE, CHEVY PICKUP THAT WAS PARKED ON THE WEST SIDE OF THE STREET FACING SOUTH. IT APPEARED TO BE A STRIPED VEHICLE.

Q AND DID YOU FILL OUT A COMPLAINT REPORT REGARDING THIS INCIDENT, DEPUTY?

A DID I FILL OUT – YOU MEAN DID I WRITE THE REPORT?

Q YES.

A I DON'T RECALL IF I DID OR NOT. THERE WAS A LOT WENT ON THAT DAY.

Q I'M GOING TO SHOW YOU A DOCUMENT, IF YOU COULD REFRESH YOUR RECOLLECTION.

A YES, I DID.

Q OKAY. IS THAT YOUR REPORT?

A YES.

Q OKAY.

AND ON THAT REPORT, YOU INDICATED WHERE YOU FOUND THIS VEHICLE, CORRECT?

A THAT'S CORRECT.

Q AND ACCORDING TO THE REPORT WRITTEN ON AUGUST 3RD, 19'99, WHERE, IN FACT, WAS THE VEHICLE FOUND? WHAT ADDRESS?

A THE ADDRESS INDICATED ON THE COMPLAINT REPORT.

Q AND WHAT ADDRESS WOULD THAT BE, [15] DEPUTY?

A I BELIEVE WHAT? 241?

Q IS THAT YOUR TESTIMONY THEN, 241?

A IF IT'S ON THE THING, YES, BECAUSE I GOT THE NUMBER OFF THE CURB.

Q OKAY.

AND EVERYTHING ON THIS DOCUMENT IS TRUE AND CORRECT, DEPUTY?

A IT'S TRUE AND CORRECT AT THAT PARTICULAR TIME AS COULD BE, YES.

THE COURT: 241 WHAT?

THE WITNESS: 241 THIRD AVENUE. IT SHOULD BE REFLECTED.

THE COURT: ALL RIGHT. OKAY.

THAT'S WHERE YOU SAW THIS STRIPED WHITE CHEVY PICKUP?

THE WITNESS: YES.

THE COURT: ALL RIGHT.

Q BY MR. ESCOBEDO: OKAY.

AND, DEPUTY, WHEN YOU OBSERVED THIS VEHICLE, DID IT HAVE ANY TYPE OF WHEELS ON IT?

A IT HAD AN ARRAY OR ASSORTED WHEELS ON IT, FOUR DIFFERENT TYPES.

Q AND THEY WERE ON THE HUBS? THE WHEELS WERE ON THE HUBS?

A TIRES WERE ON THE TRUCK, YES.

Q AND YOU INDICATED THAT YOU WERE ABLE TO OBSERVE TIRE TRACKS LEADING AWAY FROM THE [16] STOLEN VEHICLE, CORRECT?

A YES.

TIRE TRACKS, RIM TRACKS, YES.

Q. AND THE VEHICLE WAS, AT THE TIME YOU OBSERVED IT, PARKED ON A PAVED PUBLIC STREET, CORRECT?

A ASPHALT STREET, CORRECT.

Q OKAY.

AND YOU INDICATED THAT YOU WERE ABLE TO FOLLOW THESE TIRE TRACKS TO A – WHAT YOU – THE WAY YOU DESCRIBE IT, A DRIVEWAY, CORRECT?

A THAT'S CORRECT.

Q NOW, BASED UPON YOUR MEMORY OF THAT DRIVEWAY, HOW LONG WAS THAT DRIVEWAY FROM THE CURB BACK TO THE END OF THE DRIVEWAY TO WHERE THE GATE IS LOCATED?

A IT'S REALLY DIFFICULT FOR ME TO PICTURE. I'D SAY SOMEWHERE BETWEEN TWO, 300 YARDS MAYBE. MAYBE NOT EVEN THAT FAR. I NEVER REALLY – I NEVER REALLY FOCUSED ON HOW FAR IT WAS.

Q TWO TO 300 YARDS?

A POSSIBLY.

YOU KNOW, I'M GUESSING.

Q AND HOW WIDE –

THE COURT: FROM WHERE THE VEHICLE WAS PARKED TO THE MOUTH OF THE DRIVEWAY?

THE WITNESS: NO.

HE'S ASKING ME FROM THE SIDEWALK [17] AREA ABOVE THE APRON TO THE GATE.

THAT'S THE DIRECT – THE LENGTH, THE DISTANCE, CORRECT?

Q. BY MR. ESCOBEDO: CORRECT.

A I'D SAY 200 YARDS MAYBE. MAYBE A LITTLE MORE, GIVE OR TAKE.

Q AND WHAT IN YOUR ESTIMATE WAS THE DISTANCE BETWEEN THE STOLEN VEHICLE AND THE ENTRANCE TO THAT DRIVEWAY?

A THIRTY TO 40 YARDS.

Q AND IN WHAT DIRECTION WAS THE STOLEN VEHICLE FROM – IN RELATION TO THE ENTRANCE TO THE DRIVEWAY?

A IN WHAT DIRECTION? YOU MEAN WHICH WAY WAS IT FACING?

Q RIGHT.

A DRIVEWAY IS ON THE EAST SIDE OF THE STREET. THE TRUCK WAS ON THE WEST SIDE OF THE STREET FACING SOUTH.

Q AND WAS THE TRUCK LOCATED NORTH OR SOUTH OF THE DRIVEWAY?

A SOUTH OF THE DRIVEWAY.

Q SO THE TRUCK WAS LOCATED, IN YOUR ESTIMATE, ABOUT 30 YARDS SOUTH OF THE ENTRANCE TO THIS DRIVEWAY?

A YES.

Q HOW WIDE WAS THAT DRIVEWAY?

A STANDARD TWO-CAR DRIVEWAY, I [18] BELIEVE.

IT'S A STANDARD TWO-CAR APRON OR DRIVEWAY LEADING FROM THE STREET TO THE SIDEWALK, THAT'S CONSIDERED AN APRON, IT'S APPROXIMATELY A TWO-CAR WIDTH.

THE COURT: ONE MOMENT, COUNSEL.

(THERE WAS A DISCUSSION HELD OFF THE RECORD ON AN UNRELATED CALENDAR MATTER.)

THE COURT: ALL RIGHT.

YOU MAY CONTINUE.

MR. ESCOBEDO: OKAY.

Q DEPUTY, I'M GOING TO SHOW YOU A PHOTOGRAPH THAT'S BEEN MARKED AS DEFENSE EXHIBIT A.

DO YOU RECOGNIZE THAT PHOTOGRAPH?

A IT APPEARS TO BE THE DRIVEWAY THAT LEADS FROM ACROSS – FROM THE WEST SIDE OF THE STREET, WEST SIDE OF THIRD AVENUE LOOKING DOWN EAST ON – DOWN THAT DIRT DRIVEWAY.

Q OKAY.

AND COULD YOU PLEASE DESCRIBE WHAT IS LOCATED ON EITHER SIDE OF THAT DRIVEWAY. WHAT DO YOU SEE?

A WELL, THERE IS VEHICLES PARKED ON EITHER SIDE OF IT. FENCE ON THE LEFT – ON THE NORTHSIDE, A CAR WAY DOWN ON THE NORTHSIDE, CARS ON [19] THE – ON THE SOUTH SIDE. AND WAY DOWN AT THE END, YOU CAN SEE THE WHITE GATE.

Q OKAY.

AND DO YOU SEE RESIDENCES, RESIDENTIAL HOUSING ON EITHER SIDE OF THAT DRIVEWAY?

A I DO NOW.

WELL, THERE IS A HOUSE ON THE NORTHSIDE, RIGHT THERE WHERE THE TRUCK IS PARKED, JUST – JUST EAST OF THE CURB. AND THERE IS OTHER HOUSE DOWN THERE. YES, I KNOW ABOUT THEM.

Q OKAY.

NOW, YOU TESTIFIED – OR YOU PUT IN YOUR REPORT THAT YOU WERE ABLE TO FOLLOW TIRE TRACKS, CORRECT?

A TRACKS, YES.

Q OKAY. AND YOU ARE INDICATING – IS IT YOUR TESTIMONY THAT YOU WERE ABLE TO FOLLOW THE TIRE TRACKS FROM THE LOCATION OF THE STOLEN TRUCK ACROSS THE PAVED STREET WHICH IS DEPICTED IN THAT PHOTOGRAPH?

A UH-HUM.

Q AND THE TIRE TRACKS, WHAT DO YOU – CAN YOU PLEASE. BE MORE SPECIFIC WHEN YOU DESCRIBE THE TIRE TRACKS.

A OKAY.

WHEN WE DISCOVERED THE VEHICLE, THE LEFT FRONT –

[20] THE COURT: ONE MOMENT.

WE HAVE GOT TESTIMONY THAT'S INCONSISTENT WITH YOUR QUESTION. YOU KEEP SAYING TIRE TRACKS AND THE WITNESSES IS SAYING TRACKS. AND HIS EARLIER RESPONSE WAS TIRES AND RIM TRACKS, I BELIEVE.

YOU WANT TO CLARIFY THAT?

MR. ESCOBEDO: OKAY.

Q IN YOUR ORIGINAL REPORT, DEPUTY, HOW DID YOU DESCRIBE WHAT MARKS THAT YOU OBSERVED ON THE ROADWAY?

A I BELIEVE I DESCRIBED THEM AS BEING MARKS LEFT BY THE OUTER PORTION OF A TIRE RIM.

IF I – IF I – WITHOUT LOOKING AT THE REPORT. BUT I BELIEVE I SAID THAT THE MARK WAS LEFT BY THE RIM BECAUSE THE TIRE WAS LOW ON AIR, ALMOST FLAT ON THE LEFT FRONT SIDE OF THE TRUCK.

Q AND DID YOU INDICATE THAT INFORMATION TO OFFICER WALLS, DEPUTY WALL?

A YES, I DID.

Q SO IF DEPUTY WALL PUT IN THE AFFIDAVIT THAT YOU OBSERVED TIRE TRACKS, HE WOULD BE INCORRECT THEN, RIGHT?

A WELL, TIRE TRACKS –

MS. NAJERA: OBJECTION, ARGUMENTATIVE AS TO WHAT DEPUTY WALL WOULD PUT IN HIS REPORT.

THE COURT: SUSTAINED.

[21] Q BY MR. ESCOBEDO: OKAY.

SO IT'S YOUR TESTIMONY THAT YOU WERE ABLE TO OBSERVE THESE TIRE MARKS, TIRE TRACKS ACROSS THE 40 FOOT WIDE PAVED PUBLIC STREET, CORRECT?

A YES.

Q AND THEN FOLLOWED THEM THIS 200 – 200 TO 300 YARDS DOWN THE ROADWAY?

A YES.

Q NOW, WOULD YOUR CHARACTERIZATION OF THIS ROADWAY BE A ROAD AREA – BE A ROADWAY OR DRIVEWAY AFTER CONSIDERING THE LENGTH OR WIDTH.

A I WOULD SAY A COMBINATION OF DIRT AND HARD ROCK.

Q THE QUESTION WAS HOW WOULD YOU DESCRIBE IT, AS A ROADWAY OR DRIVEWAY?

A I CONSIDER IT A DRIVEWAY.

Q AS IF SOMEONE – AS A CONCRETE DRIVEWAY LEADING UP TO SOMEONE'S HOUSE?

A NO, A DRIVEWAY, A DIRT DRIVEWAY OR DIRT – IT'S NOT A COUNTY ROAD, SO, THEREFORE, IT CAN'T BE CONSIDERED A ROAD. I WOULD JUST SAY A DRIVEWAY.

THE COURT: DO YOU KNOW WHETHER IT'S ON PRIVATE OR PUBLIC PROPERTY?

THE WITNESS: THAT I HONESTLY DON'T KNOW.

THE COURT: OKAY.

ALL RIGHT. WE'RE GOING TO HAVE [22] ADDRESS THE TRIAL MATTER AT THIS TIME.

YOU WANT TO STEP DOWN FOR A MOMENT, DEPUTY.

RECESS THIS MATTER WHILE WE ADDRESS ANOTHER MATTER.

(THE COURT HEARD OTHER UNRELATED CALENDAR MATTERS.)

THE COURT: ALL RIGHT. YOU MAY RESUME YOUR EXAMINATION.

MR. ESCOBEDO: YES.

DIRECT EXAMINATION (RESUMED.)

BY MR. ESCOBEDO:

Q DEPUTY SPITULSKI, IN ADDITION TO THE COMPLAINT REPORT, YOU ALSO FILLED OUT A VEHICLE REPORT REGARDING THE STOLEN PICKUP?

A CHP-180, SIR?

Q THAT IS CORRECT.

A I BELIEVE I DID.

Q AND ON THAT FORM, WHERE DID YOU INDICATE WHERE – WHERE DID YOU INDICATE WHERE THE STOLEN TRUCK WAS LOCATED?

A I'M NOT SURE, SIR, WHETHER I PUT THE SAME ADDRESS OR THE HUNDRED BLOCK OF THE – WHERE THE TRUCK WAS LOCATED FOR THE PURPOSES OF THE [23] TOW COMPANY.

Q OKAY.

LET ME SHOW YOU THE DOCUMENT TO REFRESH YOUR RECOLLECTION.

AND AFTER REVIEWING THAT, CAN YOU TELL ME WHERE YOU INDICATED THE TRUCK WAS LOCATED?

A I INDICATED THE SAME ADDRESS, 241 THIRD AVENUE IN BASSET.

Q NOW, I'M GOING TO SHOW YOU A VIDEO, DEPUTY, IF YOU CAN PLEASE TURN TO YOUR RIGHT.

I WANT YOU TO DESCRIBE WHAT YOU SEE.

OOPS, I'M SORRY.

OKAY. RIGHT THERE.

IT'S A LITTLE BLURRY, BUT CAN YOU PLEASE TELL THE COURT WHAT YOU SEE.

A OKAY.

IT APPEARS TO BE A DIRT ROAD.

Q IS THAT –

A THAT'S THE DIRT ROAD THAT WE'RE TALKING – THAT IS IN QUESTION.

Q OKAY.

A IT'S EITHER – IT'S CONSIDERED – I CONSIDER IT A DRIVEWAY BECAUSE IT LEADS TO VARIOUS HOUSES WHO IN TURN HAVE THEIR OWN DRIVEWAYS.

Q OKAY.

[24] LET ME CONTINUE ON HERE.

NOW, RIGHT THERE, CAN YOU PLEASE DESCRIBE – YOU INDICATE IN YOUR COMPLAINT REPORT AND VEHICLE REPORT THAT THE STOLEN VEHICLE WAS RECOVERED AT 241 THIRD STREET, CORRECT?

A UM-HUM.

Q AND WHERE WOULD THAT BE IN RELATIONSHIP TO WHAT YOU SEE HERE ON THE VIDEO SCREEN?

A THAT I COULDN'T TELL YOU, SIR. I'D HAVE TO – LOOKING AT THIS BLOCK, I DON'T – I COULDN'T TELL YOU. I KNOW HE – IF I'M NOT MISTAKEN –

Q YOU INDICATED THAT WAS SOUTH OF –

A IT'S SOUTH, THAT'S CORRECT. WE'RE LOOKING SOUTH AT THIS PARTICULAR POINT.

Q SO IT WOULD BE SOMEWHERE IN THIS DIRECTION THEN, CORRECT?

A PROBABLY.

Q OKAY.

LET ME BACK IT UP HERE A MINUTE.

IT – IT WOULD APPEAR YOU WERE DIRECTLY ACROSS THE STREET FROM THE DRIVEWAY.

A CORRECT.

(PAUSE.)

Q OKAY.

[25] NOW, RIGHT THERE. JUST BEFORE THE CAMERA MOVED, WHAT NUMBER DID YOU SEE THAT WAS INDICATED ON THE CURB?

A 210.

OKAY.

AND RIGHT THERE, WHAT NUMBER DO YOU BELIEVE THAT INDICATES? LET ME –

A LOOKED LIKE IT MAY HAVE BEEN 220.

Q OKAY.

DID YOU BETWEEN 210 AND 220 SEE ANY OTHER NUMBER PAINTED ON THE CURB?

A NO.

Q OKAY.

OKAY. SO YOUR TESTIMONY WOULD BE THAT THE VEHICLE ACTUALLY WAS LOCATED SOMEWHERE AROUND THIS AREA, CORRECT?

A I DON'T KNOW HOW FAR DOWN BUT JUDGING FROM WHERE YOU ARE SUPPOSEDLY STANDING ACROSS FROM THE DRIVEWAY, IT WOULD BE SOUTH OF YOUR LOCATION OR SOMEWHERE ALONG THE CURBLINE THERE.

Q THE VEHICLE WAS NOT FOUND DIRECTLY IN FRONT OF THE –

A NO.

Q – ENTRANCE OF THE DRIVEWAY?

AND IT'S YOUR TESTIMONY YOU WERE ABLE TO FOLLOW TIRE TRACKS, TIRE GOUGES FROM THE 241 LOCATION ON THE PAVED ROAD APPROXIMATELY 30 YARDS DOWN THIS THREE – 200 TO 300 YARD DRIVEWAY, IN YOUR [26] WORDS, CORRECT?

A YES.

AND, AGAIN, THE DISTANCE BETWEEN THE – THE SIDEWALK AND THE FAR GATE I'M GUESSING AT. I COULDN'T SEE HOW FAR IT WAS, HOW FAR IT –

Q YOUR TESTIMONY WAS 200 YARDS.

A OKAY.

IT MAY BE, MAY NOT. IT'S DIFFICULT TO TELL ON THIS, AND I'M NOT THAT GREAT AT DISTANCE AS FAR AS –

Q OKAY.

NOW, LET'S SEE. WAS THE CONDITION OF THE ROADWAY SIMILAR TO WHEN YOU FIRST OBSERVED THE STOLEN VEHICLE AS IT IS DEPICTED IN THIS VIDEO?

A IT APPEARS TO BE. I'D HAVE TO GET RIGHT ON IT AND LOOK AT IT. IT APPEARS THE SAME.

Q OKAY.

THIS IS CONSISTENT WITH THE ROADWAY BACK ON AUGUST 2ND, 1999?

A ARE YOU WALKING DOWN THE DRIVEWAY AT THIS POINT?

Q YES.

A IT WOULD APPEAR TO BE.

Q IS THERE ANY PARTICULAR SIDE THESE TRACKS WERE LOCATED, ON THE SOUTH SIDE OF THE ROADWAY OR NORTHSIDE OF THE ROADWAY, DO YOU RECALL, OR WERE THEY RIGHT DOWN THE MIDDLE?

A I THINK THEY WENT FROM – I MAY BE [27] MISTAKEN BUT I BELIEVE THEY WENT FROM JUST GRADUALLY NORTH OF THE CENTER LINE OR CENTER OF THE ROAD ON DOWN TO THE GATED AREA. I DON'T THINK IT WENT IN A – A CONFIGURATION. I THINK IT WAS PRETTY MUCH A STRAIGHT LINE.

Q AND THIS IS THE GATE THAT YOU OBSERVED ON THAT DATE, CORRECT?

A THE ONE TO THE RIGHT, YEAH.

Q NOW, ON THE DAY IN QUESTION, WAS THE BACKYARD OR THIS AREA IN THIS CONDITION ON AUGUST 3RD?

A I VENTURE TO SAY IT WAS WORSE.

Q WORSE, MEANING THAT THERE WAS –

A THERE WAS A LOT MORE CARS BACK THERE AND JUNK AND DEBRIS.

Q AND THAT INCLUDED WHEELS AND TIRES?

A I WOULD IMAGINE SO.

Q OKAY.

DID YOU ALSO OBSERVE A ROLL OFF, ONE OF THOSE METAL CONTAINERS, CARGO BOXES? DID YOU OBSERVE THAT?

A WHEN?

Q OKAY.

LET ME PUT IT RIGHT THERE.

WELL, I DON'T KNOW IF YOU CAN SEE. WHAT DO YOU SEE RIGHT THERE?

RIGHT THERE.

A OH, ALL THE TIRES AND THE RIMS.

[28] Q OKAY.

NOW, WAS THAT THE SIMILAR CONDITION AS TO WHEN YOU FIRST OBSERVED IT ON AUGUST 3RD?

A WELL, IT WOULD BE DIFFICULT TO SAY YES OR NO BECAUSE I REALLY DIDN'T PAY MUCH ATTENTION TO THAT.

Q OKAY.

BUT YOU DID OBSERVE A LOT OF AUTO PARTS?

A UH-HUH.

Q IT WAS A JUNK YARD BACK THERE, VIRTUALLY?

A AUTO PARTS, YES.

MR. ESCOBEDO: OKAY.

NOW –

I HAVE NOTHING FURTHER WITH THIS DEPUTY, YOUR HONOR.

THE COURT: ANY QUESTIONS?

CROSS-EXAMINATION

BY MS. NAJERA:

Q JUST AS TO WHEN YOU GOT TO THE BACK WHERE THE WHITE GATE WAS, WHERE THE SEARCH WARRANT WAS SERVED, THERE WAS AN AREA THERE THAT YOU MADE AN OBSERVATION OF AROUND THE DIRT; IS THAT CORRECT?

A YES.

[29] Q AND WHAT WAS THAT OBSERVATION?

A THE OBSERVATION WAS THAT ON THE INTERIOR PORTION OF THE GATE, ON THE OTHER SIDE OF THE GATE WAS AN AREA, APPROXIMATELY, I'D SAY 15, 20 FEET SQUARE HAD BEEN RAKED OVER AND WATERED. IT LOOKED AS THOUGH SOMEBODY HAD RAKED, TAKEN A REGULAR RAKE AND JUST RAKED IT OVER IT, WATERED IT DOWN AND THEN RAKED OVER IT AGAIN AND WATERED IT DOWN.

TO THE IMMEDIATE RIGHT OF THE AREA –

THE COURT: I'M SORRY.

YOU ARE REFERRING TO THE INSIDE?

THE WITNESS: I'M TALKING FACING THE GATE LOOKING TO THE LINE SIDE OF THE PROPERTY, TO THE IMMEDIATE RIGHT OF THE GATED

AREA, I SAW – WELL, I SAW WHAT APPEARED TO BE A BEDLINER STANDING ON END. I BELIEVE IT MAY HAVE BEEN LEANING AGAINST SOMETHING.

DIRECTLY ON THE OTHER SIDE OF THIS PADDED AREA OR THIS WET DOWN, RAKED AREA APPEARED TO BE SOMETHING ON A – EITHER A WOODEN PALLET, A PIECE OF WOOD OR SOMETHING OF THIS NATURE. AND IT APPEARED TO BE – IT COULD HAVE BEEN A MOTOR, IT COULD NOT HAVE BEEN, I DON'T KNOW. IT WAS COVERED WITH, BELIEVE, AN ORANGE TARP. I COULDN'T – WE COULDN'T SEE AROUND IT OR ANY – GET A GOOD OBSERVATION OR A GOOD VIEW TO OBSERVE WHAT WAS UNDER IT.

TO THE LEFT OF THE GATED AREA, THERE WERE TIRES AND RIMS. BUT THE TIRES AND RIMS [30] THAT WE SAW DIRECTLY TO THE LEFT MATCHED THE SAME TIRE AND RIM THAT WAS ON THE LEFTHAND FRONT SIDE TRUCK – OF THE TRUCK THAT WE HAD JUST RECOVERED.

THE COURT: WAS THERE SOMETHING SPECIAL ABOUT THE TIRE?

THE WITNESS: WELL, IT'S A WHITE – I DON'T KNOW THE PROPER NAME FOR IT, BUT IT WAS WHITE RIM, WHITE SPOKED RIM THAT WAS PAINTED – IT WAS WHITE. AND I'M NOT SURE WHETHER IT HAD RED LINES ON IT OR NOT. BUT I KNOW IT WAS A SPOKED RIM AND WAS WHITE.

AND WHAT CAUGHT OUR EYE IS THE FACT THAT – OR CAUGHT MY EYE, THE FACT THERE WAS

THREE OF THEM SITTING RIGHT THERE NEXT TO THE FENCE, THE SAME THING THAT WAS ON THE TRUCK.

Q BY MS. NAJERA: NOW ONE THING JUST FOR POINT OF CLARIFICATION.

DID YOU BRING A NARCOTICS DOG WHEN YOU FIRST ARRIVED AT THE PLACE WITH A – WITH A SEARCH WARRANT?

A NO.

Q WAS A DOG BROUGHT IN AFTER NARCOTICS WERE FOUND AT THE LOCATION?

A YES. AFTER – AFTER SOMEBODY DISCOVERED A SUBSTANTIAL AMOUNT.

MS. NAJERA: I HAVE NOTHING FURTHER.

MR. ESCOBEDO: CAN I CUE THIS UP, YOUR HONOR? I HAVE ONE MORE SCENE I WANT TO SHOW THE DEPUTY.

[31] REWIND IT HERE.

REDIRECT EXAMINATION

BY MR. ESCOBEDO:

Q DEPUTY, WHAT I'M GOING TO SHOW YOU IS A VIDEO THAT WAS TAKEN ON THE DAY THAT THE SEARCH WARRANT WAS EXECUTED.

THE VIDEO WAS TAKEN BY ONE OF YOUR DEPUTIES.

WERE YOU ON THE TEAM THAT EXECUTED THE SEARCH WARRANT, DEPUTY?

A YES.

Q OKAY.

DO YOU RECALL ONE OF YOUR DEPUTIES VIDEOTAPING THE SCENE?

A MY CONCERN WAS – I HAD OTHER – OTHER CONCERNS OTHER THAN VIDEO.

Q SO YOUR TESTIMONY IS YOU DON'T REMEMBER?

A WELL, THERE WAS SOMEBODY THAT WAS VIDEOTAPING, YES, I KNEW THAT.

Q SOMEBODY WAS VIDEOTAPING?

A SOMEBODY WAS VIDEOTAPING. I'M NOT SURE WHO WAS DOING – WHO WAS DOING THE VIDEOTAPING.

MR. ESCOBEDO: OKAY.

SORRY, YOUR HONOR. I WOULD HAVE [32] THIS CUED UP. I HAVE TWO VIDEOS ON ONE TAPE SO I GOT TO GO BACK AND FORTH HERE.

(PAUSE.)

MR. ESCOBEDO: OKAY.

Q JUDGING FROM THIS VIDEO, THERE IS LITERALLY HUNDREDS OF AUTO PARTS ON THAT PROPERTY, CORRECT?

A UM-HUM, YEAH. YES.

Q AND WHEN – ON AUGUST 3RD WHEN YOU LOOKED OVER THAT CHAIN LINK FENCE – WELL, STRIKE THAT.

THIS VIDEO WAS TAKEN THE DAY AFTER YOU OBSERVED THE STOLEN TRUCK, CORRECT, AND MADE YOUR OBSERVATIONS OVER THE CHAIN LINK FENCE, CORRECT?

A I'M NOT SURE IF IT WAS A DAY OR TWO AFTER. I DON'T REMEMBER.

Q RIGHT THERE.

OOPS.

A THE BLUE CONTAINER?

Q YEAH.

A THE BLUE CONTAINER WAS NOT THERE AT THE TIME OF OUR OBSERVATION.

Q OKAY.

HOW ABOUT ALL THESE – LET'S SEE. RIGHT THERE. DID YOU OBSERVE THESE HUNDRED OR SO TIRES STACKED ON THE DAY OF YOUR OBSERVATION ON [33] AUGUST 2ND?

A CAN YOU PLAY IT BACK?

BACK IT UP AND PLAY IT AGAIN A LITTLE BIT.

(PAUSE.)

Q RIGHT THERE.

DID YOU OBSERVE ALL THESE WHEELS OF TIRES ON THE DAY THAT YOU MADE YOUR OBSERVATION FROM THE GATE?

A ALL THOSE ON THE RACK APPEAR – I REMEMBER SEEING, YES.

THE ONES DIRECTLY IN FRONT OF THAT CONTAINER, I DON'T REMEMBER BECAUSE THAT'S WHERE THAT TARP THING WAS THAT – THAT WE HAD LOCATED OR SAW.

Q DID IT INDICATE THAT THE PROPERTY OWNER WAS ATTEMPTING TO CLEAN UP THE AREA WHEN YOU OBSERVED THE BACK – THE BACK AREA ON AUGUST 2ND?

MS. NAJERA: I'M GOING TO OBJECT, CALLS FOR SPECULATION.

THE WITNESS: I DON'T KNOW.

THE COURT: OVERRULED.

MR. ESCOBEDO: NOTHING FURTHER, YOUR HONOR.

THE COURT: ANYTHING FURTHER?

MS. NAJERA: NOTHING FURTHER, YOUR HONOR.

THE COURT: THANK YOU, SIR.

YOU MAY STEP DOWN.

[34] MR. POPE: YOUR HONOR, MAY I ASK SOME QUESTIONS?

THE COURT: WELL, I HAVE A JURY PANEL COMING IN AT 1:30.

MR. POPE: I'LL BE BRIEF AS I CAN.

THE COURT: ALL RIGHT. YOU MAY.

MR. POPE: THANK YOU.

CROSS-EXAMINATION

BY MR. POPE:

Q OFFICER SPITULSKI, YOU HAVE KNOWN MY CLIENT, MR. CUSKEY, FOR HOW LONG, SIR?

MS. NAJERA: I'M GOING TO OBJECT AS IRRELEVANT.

THE COURT: I'M SORRY. I'LL NEED TO HEAR THE QUESTION.

MR. POPE: I WAS INQUIRING HOW LONG THE OFFICER HAS KNOWN MY CLIENT.

GOING TO MOTIVE.

THE COURT: OVERRULED.

MR. POPE: THANK YOU.

THE WITNESS: OH, I DON'T KNOW. MAYBE A YEAR AND A HALF.

Q BY MR. POPE: ALL RIGHT.

AND YOU HAVE KNOWN HIM IN CONNECTION WITH YOUR ACTIVITIES AS PART OF THE LOS ANGELES COUNTY CODE ENFORCEMENT TEAM, IS THAT CORRECT?

[35] A YES.

Q AND YOU HAVE BEEN ONTO THAT PROPERTY, LET'S SAY, BEFORE THE DATE OF THESE OBSERVATIONS HOW MANY TIMES, SIR?

A I'D SAY TWICE, I BELIEVE. ONCE WITH THE CODE ENFORCEMENT.

AND I HAD BEEN TO THE PROPERTY MORE THAN TWICE, BUT I HAD BEEN ON THE PROPERTY, I BELIEVE, TWICE.

Q HOW MANY TIMES HAVE YOU BEEN TO THE PROPERTY?

A OH, I DON'T KNOW. MAYBE FOUR OR FIVE.

Q ALL RIGHT.

AND EACH OCCASION, YOU OBSERVED WHAT YOU CONSIDERED TO BE A – NON-HEALTHY CONDITIONS, NAMELY, THE ACCUMULATION OF TIRES, AUTO PARTS AND SO ON, IS THAT CORRECT?

MS. NAJERA: I'M GOING TO OBJECT AS IRRELEVANT.

THE COURT: OFFER OF PROOF?

MR. POPE: YES, YOUR HONOR.

WHAT WE'RE TRYING TO SHOW IS THAT THIS WHOLE SEARCH WARRANT WAS BASED UPON THE OFFICERS', NO. 1, DISLIKE FOR MY CLIENT AND, NO. 2, A DESIRE TO OBTAIN EVIDENCE IN ITS ENFORCEMENT TEAM ACTIVITIES.

THE COURT: SUSTAINED.

[36] THE WITNESS: I –

THE COURT: THE OBJECTION WAS SUSTAINED.

THE WITNESS: I'M SORRY.

THE COURT: NEXT QUESTION.

Q BY MR. POPE: SIR, YOU WERE A DEFENDANT IN A FEDERAL LAWSUIT FILED BY MY CLIENT IN 1998, IS THAT CORRECT?

A I DON'T BELIEVE SO.

MS. NAJERA: OBJECTION, IRRELEVANT.

THE COURT: OVERRULED.

Q BY MR. POPE: WERE YOU AWARE THAT MEMBERS OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, TO INCLUDE YOUR – YOUR PARTNER, SIMPKINS, WERE SUED BY MY CLIENT IN FEDERAL COURT?

MS. NAJERA: OBJECTION, IRRELEVANT.

THE COURT: OVERRULED.

THE WITNESS: I WAS TOLD THAT THERE WAS A LAWSUIT, YES.

Q BY MR. POPE: ALL RIGHT.

AND YOU WERE TOLD THAT BY WHOM?

A OH, SEVERAL PEOPLE.

Q ALL RIGHT.

WOULD YOU CARE TO NAME ONE OF THE PEOPLE?

A OKAY. MY SERGEANT, FOR ONE. THE YOUNG LADY THAT – THE ABATEMENT TEAM MANAGER THAT WENT OUT TO HIS PROPERTY, THAT WAS ANOTHER ONE THAT ALSO TOLD ME.

[37] Q AND YOU – YOU FELT A CERTAIN AMOUNT OF ANIMOSITY TOWARDS MR. CUSKEY BEHIND THAT LAWSUIT, IS THAT CORRECT?

A NO. I HAVE NEVER HAD ANY DEALINGS WITH MR. CUSKEY.

Q YOU INDICATED THAT YOU SAW – MAYBE I DIDN'T UNDERSTAND. WAS IT YOU SAW GOUGES IN THE ROAD OR YOU SAW WHEEL TRACKS WITH TREADS ON THEM? WHICH ONE WAS IT?

A ALL RIGHT.

SIR, THE EASIER WAY TO EXPLAIN IT WOULD BE THE TIRE ON THE LEFT FRONT SIDE OF THE TRUCK WAS ALMOST FLAT. AND IN ITS CONDITION, IF – IF YOU PUSH A CAR AND TURN A WHEEL ON A ROADWAY WITH THAT CONDITION, THE WEIGHT IS GOING TO TRANSFER TO THE ONE EDGE OF THE TIRE RIM. THE TIRE RIM IN THAT RESPECT IS GOING TO MARK THE ASPHALT. THAT'S WHAT I FOLLOWED FROM WHERE THE TRUCK WAS TO THE DRIVEWAY.

Q SO, AS I UNDERSTAND IT, YOU FOLLOWED WHAT APPEARED TO BE THE MARKINGS FROM ONE SINGLE TIRE?

A THAT'S CORRECT.

Q AND THOSE MARKINGS WERE IN THE NATURE OF A GOUGE; IS THAT CORRECT?

A I WOULDN'T SAY A GOUGE. I'D JUST SAY LIKE A GOOD SCRATCH.

Q ALL RIGHT.

AND THAT SCRATCH WOULD HAVE BEEN [38] DONE BY THE METAL; IS THAT CORRECT?

A YES.

Q THIS LEFT FRONT TIRE, WAS IT STILL ON THE VEHICLE WHEN YOU EXAMINED IT?

A YES.

Q AND WAS THAT LEFT TIRE CUT IN ANY FASHION?

YES OR NO.

A NO, NOT TO MY KNOWLEDGE. I DIDN'T SEE IT.

MR. POPE: THANK YOU.

NOTHING FURTHER.

THE COURT: ANYTHING FURTHER FROM THIS WITNESS?

MS. NAJERA: NOTHING FURTHER, YOUR HONOR.

MR. ESCOBEDO: YES.

FURTHER REDIRECT EXAMINATION

BY MR. ESCOBEDO:

Q YOU INDICATED BY A QUESTION TO THE DEPUTY DISTRICT ATTORNEY THAT YOU BROUGHT THE DRUG DOG AFTER YOU FOUND NARCOTICS; IS THAT RIGHT?

A YES. HE WAS NOTIFIED AFTER SOMEBODY HAD FOUND SOME NARCOTICS.

Q NOW, ACCORDING TO YOUR POLICE REPORT, YOU ASKED SUBJECT OJALA FOR A CONSENT TO ENTER AND SEARCH HIS ROOM, CORRECT?

[39] A THAT POLICE REPORT, SIR, I DON'T KNOW. I DIDN'T TALK TO MR. OJALA, I DON'T BELIEVE.

Q DID YOU NOT, YOUR TEAM, SEARCH THE ROOM WITH THE AID OF SERGEANT BLUHER (PHONETIC) AND HIS CANINE DOG, SHADOW, AND THAT'S WHEN THE NARCOTICS WERE FOUND?

A THERE WAS – THERE WAS SOMEBODY THAT WENT UP IN THE ROOM WITH A DOG, YES. IT WAS NOT ME.

Q SO THE DOG – THE NARCOTICS WAS FOUND WITH THE AID OF THE DOG, CORRECT?

A I ASSUME SO, YES. I WASN'T THERE.

Q THE NARCOTICS WERE NOT FOUND PRIOR TO THE DOG COMING ONTO THE PROPERTY?

A WRONG. THERE WERE NARCOTICS FOUND PRIOR TO THE DOG BEING NOTIFIED TO COME TO THE LOCATION.

Q AND THAT'S INCLUDED SOMEWHERE IN THE POLICE REPORT?

A I WOULD ASSUME SO.

MR. ESCOBEDO: NOTHING FURTHER, YOUR HONOR.

THE COURT: ANYTHING FURTHER FROM THIS WITNESS?

MS. NAJERA: NO, YOUR HONOR.

THE COURT: THANK YOU, SIR.

YOU MAY STEP DOWN.

[40] (THE COURT HEARD AN UNRELATED CALENDAR MATTER.)

THE COURT: LET'S GO BACK ON THE RECORD IN THE MATTER OF CUSKEY, ET AL.

ALL RIGHT. YOU MAY CALL YOUR NEXT WITNESS, MR. ESCOBEDO.

MR. ESCOBEDO: YES, YOUR HONOR.

DETECTIVE WALL, PLEASE.

KEITH WALL,

CALLED AS A WITNESS ON BEHALF OF DEFENDANT LONGORIA, WAS SWORN AND TESTIFIED AS FOLLOWS:

THE CLERK: WOULD YOU RAISE YOUR RIGHT HAND TO BE SWORN, PLEASE.

YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

THE WITNESS: YES, I DO.

THE CLERK: PLEASE STEP FORWARD AND BE SEATED.

THE WITNESS: KEITH WALL, W-A-L-L.

THE CLERK: STATE AND SPELL YOUR FULL NAME FOR THE RECORD, PLEASE.

THE WITNESS: KEITH WALL, W-A-L-L.

[41] THE COURT: YOU MAY PROCEED.

DIRECT EXAMINATION

BY MR. ESCOBEDO:

Q DEPUTY WALL, PLEASE STATE YOUR OCCUPATION.

A I'M A SERGEANT WITH THE LOS ANGELES SHERIFF'S DEPARTMENT. I'M STATIONED AT EAST LOS ANGELES STATION.

Q AND HOW LONG HAVE YOU BEEN A PEACE OFFICER?

A 15 YEARS.

Q ON OCTOBER 3RD, 1999, AT APPROXIMATELY 10:30, WERE YOU ON DUTY?

A YES, I WAS.

Q OKAY.

AND WERE YOU CALLED TO THIRD STREET IN THE BASSET AREA OF LOS ANGELES COUNTY?

A YES, SIR.

Q OKAY.

AND YOU WERE CALLED THERE BY DEPUTY SIMPKINS AND SPITULSKI, IS THAT CORRECT?

A YES, SIR.

Q OKAY.

AND DID – ON THAT DATE AND TIME, DID YOU OBSERVE A STOLEN VEHICLE THAT WAS PARKED ON THIRD STREET?

[42] THIRD AVENUE.

A I OBSERVED A WHITE PICKUP TRUCK. I DID NOT KNOW THE STATUS IF IT WAS STOLEN AT THAT POINT.

Q AND WHEN YOU MADE THAT OBSERVATION, WAS THE VEHICLE PARKED ON THE WEST OR EAST SIDE OF THIRD STREET?

A IT WAS ON THE WEST SIDE OF THIRD STREET FACING SOUTHBOUND.

Q AND WAS IT LOCATED AT 241 THIRD AVENUE?

A I BELIEVE THAT WAS THE NUMBER ON THE WEST SIDE OF THE STREET, YES, 241.

Q AND THE VEHICLE WAS PARKED ON THE WEST SIDE OF THE STREET?

A YES. I BELIEVE IT WAS JUST NORTH OF THAT ADDRESS.

Q OKAY.

NOW, LATER THAT DAY, DID YOU HAVE OCCASION TO FILL OUT AN AFFIDAVIT FOR A SEARCH WARRANT?

A NOT THAT DAY, NO.

Q THE NEXT DAY?

A I BELIEVE IT WAS – I'M SORRY.

Q GO AHEAD.

A I BELIEVE IT WAS AUGUST 4TH, THE FOLLOWING MORNING.

Q OKAY. AUGUST 4TH?

[43] A YES, SIR.

Q AND THAT AFFIDAVIT, YOU SUBMITTED THAT TO THE JUDGE OVER AT CITRUS, JUDGE FALLS, CORRECT?

A YES, SIR.

Q AND IN THAT AFFIDAVIT, YOU WERE – THE INFORMATION WAS TO YOUR BEST KNOWLEDGE THAT WAS IN THE DOCUMENT?

A YES, SIR.

Q EVERYTHING WAS TRUE AND CORRECT TO THE BEST OF YOUR KNOWLEDGE?

A WELL, AT THE TIME. I HAVE SINCE NOTICED A COUPLE OF MINOR MISTAKES.

Q OKAY.

AT THE TIME THAT YOU GENERATED THIS DOCUMENT, THE INFORMATION WAS PROVIDED TO YOU BY DEPUTIES SPITULSKI AND SIMPKINS, CORRECT?

A PART OF THE INFORMATION.

Q AS WELL AS YOUR OWN OBSERVATIONS, CORRECT?

A PARTLY. BUT SOME – AFTER SPEAKING TO SOME WITNESSES IN ORANGE COUNTY ALSO.

Q OKAY.

A REGARDING THE STATUS OF THAT PICKUP TRUCK.

Q OKAY.

AT THE TIME YOU FILLED OUT THIS SEARCH WARRANT AFFIDAVIT, YOU INDICATED THAT A STOLEN [44] VEHICLE WAS RECOVERED AT 214 THIRD AVENUE, CORRECT?

A IT SAYS ACTUALLY ACROSS THE STREET FROM 214 THIRD STREET IN BASSET.

AND IT – JUST LET ME CORRECT YOU. AT THE TIME THAT WE RECOVERED THE VEHICLE OR IMPOUNDED IT, I DID NOT KNOW AT THAT POINT IF

THE VEHICLE WAS STOLEN. THAT'S WHY I HAD TO DO SOME FOLLOWUP INVESTIGATION DOWN IN ORANGE COUNTY AND TO IDENTIFY THE VEHICLE TO DETERMINE WHAT THE STATUS OF THE VEHICLE WAS.

Q. OKAY.

BUT THE STATUS DIDN'T AFFECT WHERE THE VEHICLE WAS LOCATED, CORRECT?

A WELL, IT'S HARD TO TELL AT THAT POINT BECAUSE I DON'T KNOW IF SOMEBODY PARKED IT THERE, THAT IT BELONGED TO THE PEOPLE NEXT DOOR. AND I DID NOT KNOW THE STATUS OF THE VEHICLE EXACTLY AT THE INITIAL TIME OF MY INVESTIGATION. I CAME TO FIND OUT MORE LATER THAT EVENING.

Q WHEN YOU ARRIVED ON THE SCENE –

A YES, SIR.

Q – YOU OBSERVED THE VEHICLE PARKED ON THE WEST SIDE OF THE STREET, CORRECT? OF THIRD STREET, CORRECT?

A YES, SIR. FACING SOUTH.

Q SOUTHBOUND.

A YES, SIR.

Q AND IT WAS JUST NORTH OF 241, [45] CORRECT?

A YES. JUST NORTH.

Q OKAY.

NOW, DID YOU ALSO OBSERVE A – A DRIVEWAY JUST NORTH OF THE STOLEN VEHICLE?

A YES. IT WOULD HAVE BEEN SLIGHTLY NORTH AND ON THE OPPOSITE SIDE OR EAST SIDE OF THE STREET.

Q OKAY.

NOW, DID OFFICER SIMPKINS AND SPITULSKI INDICATE TO YOU THAT THEY HAD – WELL, LET ME BACK UP.

WHAT TIME DID YOU ARRIVE ON THE SCENE?

A I BELIEVE – I'M GOING TO ESTIMATE AROUND ELEVEN O'CLOCK.

Q IN THE MORNING TIME, CORRECT?

A SOMETIME AROUND THEN, YES, ON AUGUST 3RD.

Q DID OFFICER – DID DEPUTIES SIMPKINS AND SPITULSKI INDICATE TO YOU THAT THEY HAD OBSERVED TIRE TRACKS LEADING FROM THE STOLEN VEHICLE BACK TO A GATED AREA LOCATED AT THE END OF THE DRIVEWAY?

A YES, THEY DID.

Q OKAY.

DID YOU OBSERVE ANY TIRE TRACKS LEADING FROM THE STOLEN VEHICLE BACK TO THE END OF [46] THE DRIVEWAY? DID YOU PERSONALLY OBSERVE ANY TIRE TRACKS?

A I DID NOT INSPECT THAT PORTION –

Q OKAY.

A – AT THAT POINT.

Q DID YOU OBSERVE ANY TIRE GOUGES LEADING FROM THE STOLEN VEHICLE BACK TO THE END OF THE DRIVEWAY?

A I REALLY DID NOT LOOK FOR IT OR INSPECT IT AT THAT POINT.

Q SO WHEN YOU WROTE DOWN IN YOUR AFFIDAVIT THAT TIRE TRACKS WERE OBSERVED, YOU ARE JUST RELYING ON WHAT DEPUTIES SPITULSKI TOLD YOU, CORRECT?

THE COURT: WHERE IN THE AFFIDAVIT ARE YOU INDICATING THAT, COUNSEL?

MR. ESCOBEDO: YES, YOUR HONOR.

I'M REFERRING TO – IT'S ATTACHMENT NO. 6, LINES 20 THROUGH 25, BOTTOM PORTION OF THAT.

THE COURT: OKAY.

Q BY MR. ESCOBEDO: NOW, IN THE AFFIDAVIT – DO YOU HAVE A COPY OF THAT IN FRONT OF YOU, DETECTIVE WALL?

A YES, I DO.

Q REFERRING TO YOU LINE 23, IT SAYS, "THEY SAW TIRE TRACKS." NOW, THERE HAS BEEN SOME DISCREPANCY AS TO WHAT THEY SAW. BASED UPON YOUR INFORMATION THAT YOU RECEIVED FROM SIMPKINS AND [47] SPITULSKI, THEY TOLD YOU THAT THEY OBSERVED TIRE TRACKS, CORRECT?

A I BELIEVE THAT'S WHAT I REMEMBERED HEARING.

I DON'T REMEMBER SPECIFICALLY IT WAS TIRE MARKS OR TRACKS, BUT I BELIEVE THAT'S WHAT I HEARD.

Q AND WITH THAT INFORMATION, YOU PUT THAT DOWN IN YOUR AFFIDAVIT TO SUBMIT TO THE JUDGE, CORRECT?

A YES, SIR.

Q AND ACCORDING TO THE TWO DEPUTIES, THEY OBSERVED THESE TIRE TRACKS LEADING FROM WHERE THE VEHICLE WAS RECOVERED BACK TO THE GATE AT THE END OF THIS LONG DRIVEWAY, CORRECT?

A YES, SIR.

Q NOW, YOU WERE ABLE TO OBSERVE THIS DRIVEWAY, CORRECT?

THE DRIVEWAY IN QUESTION.

A YES.

Q YOU PERSONALLY OBSERVED IT?

A I DID NOT WALK IT BUT I SAW THE DRIVEWAY THAT WAS POINTED OUT TO ME.

Q OKAY.

SO YOU WERE STANDING OUT ON THIRD AVENUE LOOKING EASTBOUND ALONG THE DRIVEWAY, CORRECT?

A WELL, FROM THAT POINT, YOU COULD – YEAH, YOU – YOU COULD SEE SOME OF IT. I COULD [48] NOT SEE ALL OF IT, THOUGH.

Q OKAY.

PRETTY LONG DRIVEWAY, CORRECT?

A CAN YOU BE MORE SPECIFIC?

Q YEAH.

OVER 200 YARDS?

A I – I'D ESTIMATE THAT. THAT'S A FAIR ESTIMATE.

Q IT'S NOT THE SORT OF DRIVEWAY THAT'S PARKED – I MEAN THAT – THAT'S BUILT IN FRONT OF PEOPLE'S RESIDENCES AND WHERE THEY PARK THEIR CAR IN FRONT OF THE DRIVEWAY, CORRECT?

A I WOULD AGREE WITH THAT.

Q THIS IS MORE LIKE AN ACCESS ROAD? WOULD THAT BE A CORRECT DESCRIPTION OF THIS AREA?

A AN ACCESS ROAD? I – I – I'D HAVE TO CALL IT A DRIVEWAY.

Q OKAY.

A THAT'S BECAUSE I DON'T THINK IT GOES THROUGH. I THINK YOU – YOU GO DOWN AND YOU HAVE TO COME BACK OUT. YOU CAN'T REALLY – IT DOESN'T HAVE THROUGH TRAFFIC. I DON'T THINK

THERE WAS A – TO THE BEST OF MY RECOLLECTION, THERE IS NO ROAD SIGN OUT THAT SAYS THAT THIS IS, YOU KNOW, FIFTH STREET OR SOMETHING.

Q ALL RIGHT.

NOW, YOU – BASED UPON YOUR [49] OBSERVATIONS, THERE WERE NUMEROUS RESIDENCES ON EITHER SIDE OF THIS DRIVEWAY/ROADWAY, CORRECT?

A THERE WERE SEVERAL, YES.

Q AND DID YOU OBSERVE ANY VEHICLES ON THAT ROADWAY/DRIVEWAY AT THE TIME YOU MADE YOUR OBSERVATIONS?

A I DON'T REMEMBER. I BELIEVE THERE WAS ONE OR TWO PARKED.

Q OKAY.

NOW, IT'S YOUR TESTIMONY THAT YOU PERSONALLY NEVER WENT TO THE END OF THIS DRIVEWAY, CORRECT?

A AT WHAT POINT?

Q WHEN THE OFFICERS FIRST CALLED YOU OUT ON AUGUST 3RD.

A NO, I DID NOT.

Q OKAY.

DID YOU AT ANY TIME OBSERVE ANY TYPE OF FLUID TRAIL OR OIL, TRANSMISSION OIL LEADING FROM WHERE THE STOLEN VEHICLE WAS LOCATED

BACK ALONG THIS DRIVEWAY TO THE GATE, GATED AREA?

A I REALLY DID NOT INSPECT THAT.

I DID SEE FLUID ON THE VEHICLE ITSELF, BUT I DID NOT AT THAT POINT ATTEMPT TO TRACE IT BECAUSE I REALLY DID NOT KNOW THE STATUS OF THE VEHICLE.

Q OKAY.

NOW, YOU HAD INDICATED THAT THERE [50] WAS SOME ERRORS IN YOUR AFFIDAVIT, CORRECT?

A THERE IS A COUPLE, YES.

Q NOW, DID YOU HAVE AN OPPORTUNITY TO REVIEW THIS AFFIDAVIT BEFORE YOU SUBMITTED IT TO MAGISTRATE FALLS IN CITRUS COURT?

A YES.

Q AND AT THE TIME YOU SUBMITTED IT, EVERYTHING WAS TRUE AND CORRECT, IN YOUR OPINION?

A WELL, I COULD SAY RIGHT NOW I – OR IN THE MONTHS SINCE LAST SUMMER, I HAVE COME TO FIND OUT I DID MAKE A COUPLE MINOR ERRORS.

Q BUT MY QUESTION WAS –

A AT THE TIME – IF YOU LET ME FINISH.

AT THE TIME I SUBMITTED IT, I DID BELIEVE IT TO BE TRUE AND CORRECT AND WITH NO DELIBERATE MISSTATEMENTS.

Q AND WHAT WERE THOSE MISTAKES, DETECTIVE WALL?

A WELL, IF YOU REFER TO ATTACHMENT NO. 5, TOWARDS THE BOTTOM, I DESCRIBED THE PICKUP TRUCK BEING LOCATED ACROSS THE STREET OR ON THE STREET ACROSS FROM 214 THIRD STREET, AND IT WAS ACTUALLY NEXT TO 241 AND ACROSS FROM 234. I BELIEVE I TOOK THE ADDRESS ACROSS THE STREET WHICH IS PAINTED ON THE CURB AND IT WAS 234 AND I TRANSPOSED IT AND PUT 214.

AND ALSO I BELIEVE I MADE A [51] MISTAKE – I BELIEVE I MADE A MISTAKE ON ATTACHMENT NO. 6. LOOKS LIKE THE THIRD PARAGRAPH IS A LITTLE BIT OUT OF ORDER. THERE WAS SOME OBSERVATIONS MADE BY DEPUTY SIMPKINS AND SPITULSKI ON THE PROPERTY IN QUESTION ABOUT A BLACK TRUCK BEDLINER AND SOME – APPEARING TO BE FOR A FULL-SIZED PICKUP TRUCK. I BELIEVE THAT SHOULD HAVE COME LATER IN THE – IN THE AFFIDAVIT, PROBABLY ON – TOWARDS THE BOTTOM OF PAGE 7 WHERE THEY MADE SOME OTHER OBSERVATIONS, AN ORANGE COLORED TARP. AND IT WOULD BE PARAGRAPH 4. THAT'S WHERE THAT PARAGRAPH SHOULD BE PLACED. AND I HAD IT OUT OF ORDER.

Q OKAY.

ARE THERE ANY OTHER MISTAKES YOU NOW REALIZE WERE MADE AT THE TIME YOU SUBMITTED THESE DOCUMENTS UNDER AFFIDAVIT TO THE MAGISTRATE?

A YES.

ON PAGE OR ATTACHMENT 8, SECOND PARAGRAPH, I AGAIN TYPED IN THE WRONG ADDRESS OF 214 THIRD STREET. IT SHOULD BE A – ACROSS THE STREET FROM 214. IT SHOULD BE 241 OR ACROSS THE STREET FROM 234 THIRD STREET IN BASSET.

Q NOW, 241 IS ACTUALLY LOCATED SOUTH OF THIS DRIVEWAY, CORRECT, ENTRANCE TO THE DRIVEWAY?

A YES. ACROSS THE STREET AND A LITTLE BIT SOUTH, YES, SIR.

Q AND WHERE THE VEHICLE WAS PARKED, [52] THE DISTANCE BETWEEN WHERE THE VEHICLE WAS PARKED AND DRIVEWAY IS IN EXCESS OF 30 YARDS, CORRECT?

A I WOULD SAY IT'S RIGHT AROUND 30 YARDS. THAT'S FAIR.

Q WHEREAS, IF THE VEHICLE WAS FOUND AT 214, THAT WOULD BE DIRECTLY IN FRONT OF THE ENTRANCE TO THIS DRIVEWAY, CORRECT?

A ACTUALLY, I – I WENT BACK AND RECHECKED THAT STREET AND I COULD NOT FIND EVEN A 214 ON THAT STREET, SO I REALLY DON'T KNOW.

Q NOW, YOU WERE PART OF THE TEAM THAT EXECUTED THE SEARCH WARRANT, CORRECT?

A YES, SIR.

Q AND THERE HAS BEEN SOME VIDEO SHOWING YOU TALKING WITH THE DEFENDANT CUSKEY, CORRECT? AND YOU SPOKE WITH HIM ON THAT DATE?

A MR. CUSKEY, THAT'S CORRECT.

Q AND DO YOU RECALL OBSERVING A BIG BLUE ROLL OFF TYPE CARGO CONTAINER ON THE BACK OF THE PROPERTY ON THE DATE THE SEARCH WARRANT WAS EXECUTED?

A A CARGO CONTAINER?

Q WELL, A BLUE ROLL OFF.

A I'M NOT SURE WHAT IS A ROLL OFF.

Q BIG METAL CONTAINERS THAT YOU FILL UP WITH DEBRIS AND –

A I BELIEVE – I BELIEVE I REMEMBER SEEING SOMETHING LIKE THAT. I DON'T REMEMBER EXACTLY WHERE IT WAS. BUT I THINK IT WAS – WELL, I DON'T [53] REMEMBER EXACTLY.

Q DID YOU ALSO OBSERVE IN THAT AREA DOZENS AND DOZENS OF WHEELS AND TIRES STACKED ON A RACK?

A I'M NOT SURE EXACTLY WHICH AREA THAT IS, BUT I KNOW THERE WAS A LOT OF WHEELS AND TIRES ON THE PROPERTY, A LOT OF – A LOT OF – A LITTLE BIT OF EVERYTHING, REALLY.

Q RIGHT.

I MEAN YOU COULD DESCRIBE THAT AS A JUNK YARD, CORRECT?

A WELL, I DON'T WANT TO DEMEAN THIS PERSON'S PROPERTY. IT'S – EVERY MAN, IT'S HIS CASTLE. TO ME, IT MIGHT BE A JUNK YARD. TO HIM, IT'S HIS HOME. SO I WOULD NOT SAY THAT.

Q THERE WERE CAR PARTS ON THAT PROPERTY, THERE WERE BIRDS, THERE WERE ANIMALS, THERE WERE REFRIGERATORS, CORRECT?

A YES.

Q ALL KINDS OF THINGS?

A ALL KINDS OF STUFF.

Q IF YOU WANTED SOMETHING, YOU COULD GO BACK THERE – I MEAN ANYTHING – AND THERE IS A LIKLIHOOD YOU COULD FIND IT IN THAT PILE, CORRECT?

MS. NAJERA: I'M GOING TO OBJECT AS VAGUE.

THE COURT: SUSTAINED.

Q BY MR. ESCOBEDO: AND THERE WAS AN [54] ALLIGATOR ON THE PROPERTY, CORRECT?

A I'M NOT AN ALLIGATOR EXPERT BUT IT LOOKED LIKE AN ALLIGATOR TO ME. AND I WOULDN'T ARGUE ABOUT IT, I WOULD SAY THAT.

MR. ESCOBEDO: NOTHING FURTHER, YOUR HONOR.

THE COURT: ANY QUESTIONS?

CROSS-EXAMINATION

BY MS. NAJERA:

Q JUST WITH REGARD TO AFTER YOU RECEIVED THE INFORMATION THAT YOU DID THAT IS IN THE WARRANT FROM OFFICER – DEPUTY SIMPKINS AND SPITULSKI, DID YOU DO SOME FOLLOWUP INVESTIGATION AS WELL?

A YES, I DID QUITE A BIT.

Q AND DID YOU TALK TO THE PEOPLE WHO ORIGINALLY OWNED THE TRUCK?

A YES, I DID.

Q AND DID THEY IDENTIFY A BEDLINER THAT, IN FACT, MATCHED THE DESCRIPTION OF THE BEDLINER THAT YOU HAD BEEN PREVIOUSLY TOLD ABOUT BY SIMPKINS AND SPITULSKI?

A ACTUALLY, THEY DID NOT IDENTIFY. THIS PERSON DESCRIBED TO ME.

Q I'M SORRY?

A AFTER I DETERMINED WHO THE TRUCK BELONGED TO, I CONTACTED THESE PEOPLE. I'LL HAVE TO [55] LOOK AT MY AFFIDAVIT JUST BRIEFLY TO GET THIS GENTLEMAN'S NAME. IT WAS A MR. BRUCE WITKIN (PHONETIC), WHO OWNED A BUSINESS, I BELIEVE IT WAS A BODY SHOP DOWN IN ANAHEIM. AND HE DESCRIBED TO ME – WELL, I WANTED TO FIND OUT THE CONDITION – THE CONDITION THIS TRUCK WAS IN WHEN HE SAW IT LAST. AND HE DESCRIBED TO ME, AMONG OTHER THINGS, THAT IT HAD A FULL-SIZED BLACK

BEDLINER ON THE TRUCK WHEN IT WAS REPORTED STOLEN.

Q AND HAD DEPUTY SIMPKINS AND SPITULSKI DESCRIBED TO YOU BEFORE YOU HAD THIS INFORMATION THAT THEY HAD SEEN A BLACK FULL-SIZED BEDLINER?

A YES, THEY DID.

Q AND DO YOU RECALL WHETHER OR NOT OR WHEN THE – THE DOG WAS BROUGHT ONTO THE LOCATION?

A THE NARCOTICS DOG?

Q YEAH.

A IT WOULD HAVE BEEN PROBABLY SOME HOUR AND A HALF TO TWO HOURS AFTER WE INITIALLY SERVED THE WARRANT.

Q AND WHY WAS THE DOG CALLED FOR?

A BECAUSE ONE OF THE DEPUTIES ON THE – ON THE SEARCH TEAM, I BELIEVE IT WAS SIMPKINS, RECOVERED WHAT I WOULD CONSIDER A FAIRLY SUBSTANTIAL AMOUNT OF NARCOTICS.

MS. NAJERA: THANK YOU.

I HAVE NOTHING FURTHER.

[56] THE COURT: ANYTHING FURTHER?

MR. POPE: YES, PLEASE, YOUR HONOR.

CROSS-EXAMINATION

BY MR. POPE:

Q SIR, YOU SAW THE –

THE COURT: SHOULD WE TAKE THIS UP AT 1:30, COUNSEL?

MR. POPE: SURE.

THE COURT: ALL RIGHT.

1:30, PLEASE.

MS. NAJERA: YOUR HONOR, CAN I – MAY I ASK?

THE DEFENSE HAD SUBPOENAED BOTH DEPUTY SIMPKINS AND SPITULSKI, SO THEY ARE BASICALLY ON THE CLOCK RIGHT NOW. ONE OF THEM HAS GOT A DAY OFF AND I WONDER IF THEY ARE NOT GOING TO CALL DEPUTY SIMPKINS, IF WE COULD JUST SEND HIM BACK THAN STAY AROUND ALL DAY.

THE COURT: ALL RIGHT.

MR. POPE: COULD WE JUST HAVE A MOMENT, YOUR HONOR?

(BOTH DEFENSE COUNSEL CONFER WITH DEFENDANT CUSKEY SOTTO VOCE.)

MR. ESCOBEDO: YOUR HONOR, WE BELIEVE AT [57] THIS TIME THAT HIS TESTIMONY WILL BE REQUIRED IN THE AFTERNOON. .

THE COURT: WHAT IS THE OFFER OF PROOF?

MR. ESCOBEDO: REGARDING THE TIRE GOUGES, TIRE TRACKS, WHAT HIS OBSERVATIONS WERE.

THE COURT: YOU CHARACTERIZE TIRE GOUGES. THERE HAS BEEN NO TESTIMONY OF GOUGES. YOU USED THAT IN YOUR QUESTIONS, BUT THERE HAS BEEN NO TESTIMONY FROM ANY WITNESS TO SAY THAT THERE WERE GOUGES ANYWHERE. THERE IS ONE WITNESS WHO TESTIFIED THAT THERE WAS A – WHAT HE CHARATERIZED AS A MARK WHICH MAY HAVE BEEN MADE BY A RIM FROM A LOW TIRE, BUT THERE IS NOTHING OTHER THAN THAT BEFORE THE COURT.

ALL RIGHT. LET'S BRING THE DEPUTY IN NOW AND GET THAT TESTIMONY.

MS. NAJERA: THANK YOU, YOUR HONOR

THE COURT: YOU MAY STEP DOWN.

THE WITNESS: THANK YOU, SIR.

(THE COURT HEARD AN UNRELATED CALENDAR MATTER.)

MURRAY SIMPKINS,

CALLED AS A WITNESS BY THE DEFENDANT, WAS SWORN AND TESTIFIED AS FOLLOWS:

THE CLERK: WOULD YOU RAISE YOUR RIGHT HAND TO BE SWORN, PLEASE.

[58] YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE

TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

THE WITNESS: I DO.

THE CLERK: PLEASE STEP FORWARD AND BE SEATED.

(PAUSE.)

THE CLERK: STATE AND SPELL YOUR FULL NAME FOR THE RECORD, PLEASE.

THE WITNESS: DEPUTY MURRAY SIMPKINS, S-I-M-P-K-I-N-S.

THE CLERK: THANK YOU.

THE COURT: YOU MAY PROCEED.

MR. ESCOBEDO: YES.

DIRECT EXAMINATION

BY MR. ESCOBEDO:

Q DEPUTY SIMPKINS, HOW LONG HAVE YOU BEEN A PEACE OFFICER?

A ELEVEN YEARS.

Q ON AUGUST 3RD, 1999, AT APPROXIMATELY 8:30 A.M., WERE YOU WORKING AS A POLICE OFFICER?

A YES, I WAS.

[59] Q AND WERE YOU IN THE LOCATION OF 241 THIRD STREET IN THE AREA OF BASSET, COUNTY OF LOS ANGELES?

A YES.

Q OKAY.

AND DID YOU OBSERVE A STOLEN VEHICLE PARKED ON THE WEST SIDE OF THE STREET AT APPROXIMATELY 241 THIRD STREET?

A WELL, LATER, YES.

Q OKAY.

AND DID YOU OBSERVE ANY TYPE OF MARKS LEADING FROM THE STOLEN OR FROM THE VEHICLE IN ANY DIRECTION?

A YES.

Q AND WHAT TYPE OF MARKS DID YOU OBSERVE?

A WELL, THERE WAS AN INDENTATION IN THE ASPHALT ROADWAY THAT WENT FROM THE FRONT LEFT TIRE BACK TO THE DRIVEWAY.

Q INDENTATION, MEANING A MARK ON THE ASPHALT?

A YES.

Q OKAY.

AND – AND DID YOU OBSERVE THE FRONT LEFT TIRE – DID YOU OBSERVE THE FRONT LEFT TIRE?

A YES.

Q OKAY.

[60] WAS IT IN A FULL INFLATED CONDITION?

A IT WAS FLAT.

Q OKAY.

AND DID YOU INDICATE THAT ANYWHERE IN YOUR POLICE REPORT, DEPUTY SIMPKINS?

A I'M NOT SURE.

I HAVEN'T READ MY – I HAVEN'T REVIEWED ANYTHING EXCEPT FOR THE WARRANT ON THIS ONE.

Q DID YOU CONVEY THAT INFORMATION TO DEPUTY – EXCUSE ME – DETECTIVE WALL?

A YES.

Q OKAY.

AND IT'S YOUR – YOUR TESTIMONY THAT YOU TOLD HIM THAT YOU OBSERVED THE FRONT LEFT TIRE TO BE IN A DEFLATED STATE?

A YES. HE SAW IT.

Q OKAY.

AND YOU ARE SAYING THAT THIS DEFLATED TIRE, THE BEST OF YOUR KNOWLEDGE, CAUSED THE INDENTATION ON THE ASPHALT?

A THE RIM DID.

Q OKAY.

DID YOU OBSERVE THE RIM PROTRUDING FROM THE TIRE?

A YES.

Q OKAY.

SO THE WAY I PICTURE IT, THIS CAR [61] IS LEANING TOWARDS THE FRONT LEFT?

A IT CAN'T LEAN. THERE WAS NOTHING IN IT TO MAKE IT LEAN. IT'S GOT A FRONT FLAT LEFT TIRE.

Q OKAY.

SO IT WAS A LITTLE LOWER ON THAT SIDE?

A I'M NOT SURE IF IT WAS LOWER OR HIGHER. IT WAS TO THE RIGHT CURB.

Q DID YOU – WHEN OFFICER – YOU ASKED DETECTIVE WALL TO RESPOND TO THE LOCATION, CORRECT?

A HIM AND SERGEANT JACKSON, DAN JACKSON.

Q AND DID YOU SHOW HIM THE TIRE OR INDENTATION MARKS ON THE ASPHALT?

A I SHOWED HIM THE TRUCK. WHETHER OR NOT HE LOOKED AT IT HIMSELF, I'M NOT SURE. I WENT DOWN THE DRIVEWAY AT THAT POINT.

Q SO THE – THE – THE DESCRIPTION THAT DEPUTY WALL PUT IN HIS AFFIDAVIT THAT YOU OBSERVED TIRE TRACKS IS INCORRECT?

A NO, IT'S NOT.

Q WELL, YOUR TESTIMONY IS THAT YOU SAW INDENTATIONS?

A IN THE ROADWAY.

Q IN THE ROADWAY?

A THE TIRE.

[62] Q MADE BY THE RIM, CORRECT?

A CORRECT.

Q NOT BY THE TIRE?

A CORRECT.

Q AND WHAT IS YOUR ESTIMATE OF THE DISTANCE BETWEEN WHERE THE STOLEN VEHICLE WAS RECOVERED AND THE ENTRANCE TO THE DRIVEWAY/ROADWAY?

A TWENTY, 30 YARDS.

Q OKAY.

AND YOU WERE ABLE TO FOLLOW THAT INDENTATION THEN THAT ENTIRE LENGTH?

A YES. VERY PLAIN.

Q DID YOU, BY ANY CHANCE, TAKE ANY PHOTOGRAPHS OF THAT INDENTATION?

A NO.

WE REQUESTED DETECTIVE WALL AND SERGEANT JACKSON TO COME OUT. HE WAS THE FIELD SUPERVISOR.

Q THERE IS A STATEMENT HERE, "THEY SAW TIRE TRACKS LEADING BACK TO THE FENCE AT THE END OF A LONG DRIVEWAY THAT RAN EASTBOUND FROM THE EAST SIDE OF THIRD STREET." THAT'S INCORRECT?

A NO, THAT STATEMENT IS VERY CORRECT.

Q YOU SAW TIRE TRACKS?

A THAT PORTION, YES, SIR.

Q OKAY.

NOW, ISN'T IT TRUE THAT YOU WERE [63] ASKED TO MODIFY WHAT WAS PUT IN THIS AFFIDAVIT PERTAINING TO SOME INFORMATION? YOU WERE ASKED TO UPDATE THE INFORMATION THAT WAS IN THE AFFIDAVIT?

A NO.

Q OR CHANGE THE INFORMATION?

A NOT TO MY KNOWLEDGE. I – REFERRING TO WHAT SPECIFICALLY?

Q TIRE TRACKS.

A NO.

Q NOW, YOU WERE ABLE TO FOLLOW THESE TIRE TRACKS ALL THE WAY TO THE END OF THIS DRIVEWAY, CORRECT?

A AT SOME POINT IN TIME, WERE GOING TO HAVE TO DIFFERENTIATE BETWEEN – SO THAT I UNDERSTAND WHERE YOU ARE COMING FROM – DIFFERENTIATE BETWEEN MARKING IN THE ASPHALT ROADWAY AND THE TIRE PRINT ON THE DIRT.

Q OKAY.

WERE YOU ABLE TO OBSERVE THE MARKING ON THE ASPHALT FROM WHERE THE VEHICLE WAS

LOCATED ALL THE WAY BACK TO THE END OF THE FENCE?

A NO, BECAUSE THE ASPHALT ENDED ON THE DRIVEWAY.

Q WERE YOU ABLE TO OBSERVE THIS INDEN-TATION ON THE DIRT ON THE DRIVEWAY?

A YES, THE INDENTATION. BUT THE TIRE PATTERN, THE TIRE WAS FLAT, SO IT LEFT A DISTINCTIVE MARK ALL THE WAY BACK TO THE GATE. THAT WAS POINTED [64] OUT TO SERGEANT DAN JACKSON, I KNOW FOR SURE.

Q EXCUSE ME.

DAN JACKSON?

A YEAH. HE WAS THE FIELD SUPERVISOR THAT DAY.

Q OKAY.

NOW, YOU WALKED TO THE END OF THIS DRIVEWAY AND LOOKED INTO THE GATED AREA, CORRECT?

A YES, SIR.

Q NOW, IN ADDDITION TO ALLEGEDLY SEEING FOUR – THREE WHEELS, WHITE SPOKED WHEELS, YOU ALSO SAW DOZENS AND DOZENS OF OTHER TIRES LOCATED IN THE BACK THERE?

A I WOULDN'T SAY THAT, NO.

Q WOULD YOU SAY THAT YOU SAW MORE THAN 15 WHEELS AND TIRES BACK THERE?

A SIMILAR TO THE ONES ON THE TRUCK OR IN ADDITION TO?

Q RIGHT.

WELL, IN THAT AREA, THAT GENERAL AREA. WHEN YOU LOOKED OVER THE FENCE, YOU SAID YOU SAW THOSE FOUR WHEELS – THREE WHEELS.

EXCUSE ME.

A CORRECT.

Q IN ADDITION TO THAT, YOU SAW MANY, MANY AUTO – PIECES OF AUTOMOBILE, CORRECT?

A NO.

Q WHAT DID YOU SEE?

[65] A WELL, WHEN I LOOKED THROUGH THE FENCE, THE TIRES WERE TO THE LEFT. THEY WERE STACKED, SMALL STACK. TO THE RIGHT OF THAT WAS A PALLET WITH AN ORANGE TARP. BEHIND THE PALLET WITH THE TARP WAS SOME TIRES.

Q MORE TIRES?

A CORRECT.

Q OTHER THAN THE SPOKED ONES?

A YES.

Q WHAT DO YOU MEAN BY THAT? TEN, 15?

A I WOULD SAY MORE THAN FIVE.

Q LESS THAN 20?

A YEAH.

Q LESS THAN A HUNDRED?

A YES.

Q MORE THAN 20?

A NO, NOT IN MY MIND, AS I RECALL.

Q NOW, IT WAS INDICATED THAT YOU RECOVERED A TRUCK BEDLINER, CORRECT?

A DETECTIVE WALL DID, YES.

Q AND WAS IT EVER FOUND OUT THAT THAT BEDLINER BELONGED TO THE OWNER OF THE STOLEN VEHICLE?

MS. NAJERA: OBJECTION, CALLS FOR SPECULATION FROM THIS WITNESS.

THE COURT: NOT RELEVANT. SUSTAINED.

Q BY MR. ESCOBEDO: DID YOU EVER CHARGE MR. CUSKEY OR LONGORIA WITH POSSESSION OF [66] STOLEN AUTO PARTS?

MS. NAJERA: OBJECTION, IRRELEVANT.

THE COURT: SUSTAINED.

THE WITNESS: I BELIEVE IT WAS SUSTAINED.

MR. ESCOBEDO: NOTHING FURTHER.

THE COURT: ANY FURTHER QUESTIONS OF THIS WITNESS?

MR. POPE: YES, PLEASE, YOUR HONOR.

THE COURT: ALL RIGHT.

CROSS-EXAMINATION

BY MR. POPE:

Q SIR, IF YOU WERE TO TAKE THE ASPHALT ROAD THAT RUNS FROM WHAT WE HAVE BEEN CALLING A DRIVEWAY THAT LEADS TO THE CUSKEY PROPERTY TO THE POINT WHERE THE VEHICLE WAS STOPPED WHEN YOU FIRST OBSERVED IT, AND WE'RE TALKING ABOUT THE STRETCH OF ROAD BETWEEN THE DRIVEWAY AND WHERE THE CAR WAS –

A THIRD AVENUE.

Q THIRD AVENUE. ALL RIGHT.

IS IT YOUR TESTIMONY UNDER OATH, SIR, THERE WAS A SINGLE GOUGE LEADING FROM THE POINT OF – WHERE THE LEFT FRONT WHEEL OF THE TRUCK WAS BACK TO WHERE THE DRIVEWAY WAS?

MS. NAJERA: I'M GOING TO OBJECT. THAT MISSTATES THE TESTIMONY.

[67] THE COURT: SUSTAINED.

Q BY MR. POPE: SIR, WOULD YOU PLEASE CHARACTERIZE WHAT YOU DESCRIBE AS INDENTATION IN THE ASPHALT.

A IF I WERE TO – IF I WERE TO TAKE, SAY, THE EDGE OF A KNIFE AND RUN IT ACROSS THAT TABLE, IT WOULD SCRATCH. IT'S VERY MINOR. THAT

SCRATCH MAY DISAPPEAR IN A DAY, TWO DAYS, WHATEVER. WHATEVER, SOMEONE WASHES IT.

Q RIGHT.

A THE ASPHALT ROAD HAD THE SAME TYPE OF SCRATCH FROM THE RIM IN IT THAT LEAD DIRECTLY –

Q DID YOU ACTUALLY GET DOWN ON THE GROUND AND LOOK AT IT?

A YES, SIR.

Q HOW DEEP WAS IT, SIR?

A NO MORE THAN AN EIGHTH OF AN INCH.

Q AND HOW WIDE WAS IT AT THE TOP, THAT IS, THE TOP OF THE ROAD SURFACE?

A MAYBE IN SOME POINTS THE WIDTH OF A PEN.

Q ALL RIGHT.

WHEN YOU SAY THE WIDTH OF A PEN, ARE YOU TALKING ABOUT THE WIDTH OF THE POINT?

A NO, THE FAT PORTION.

Q APPROXIMATELY A QUARTER AN INCH, PERHAPS LONGER?

A YES.

[68] Q AND YOU WERE ABLE TO SEE A SINGLE LINE WHERE THIS INDENTATION, SCRATCH WAS IN THE ASPHALT, CORRECT?

A ALL THE WAY BACK TO THE DRIVEWAY.

Q AND YOU TOOK DETECTIVE WALL AND YOU SHOWED HIM THAT?

A YES, SIR.

Q IS THAT RIGHT?

MR. POPE: THANK YOU.

I HAVE NOTHING FUTHER.

THE COURT: ANYTHING FURTHER?

MS. NAJERA: NOTHING FURTHER.

MR. POPE: YOUR HONOR, MAY I REQUEST THE WITNESS BE INSTRUCTED NOT TO DISCUSS HIS TESTIMONY WITH DETECTIVE WALL OR THE OTHER OFFICER?

THE COURT: ALL RIGHT. THAT IS THE ORDER.

THE WITNESS: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

THIS WITNESS IS EXCUSED.

TWO O'CLOCK, PLEASE.

THE WITNESS: THANK YOU, YOUR HONOR, COUNSEL.

(AT 12:18P.M., A RECESS WAS TAKEN UNTIL 2:00 P.M. OF THE SAME DAY.)

[69] POMONA, CALIFORNIA, MONDAY, MARCH 20, 2000

2:00 P.M.

DEPARTMENT NO. EA "E"
HON. DAVID S. MILTON, JUDGE
– 000 –

APPEARANCES:

(APPEARANCES AS HERETOFORE NOTED.)

(SHARON BAKER FOX, CSR NO. 4332, OFFICIAL REPORTER.)

THE COURT: SERGEANT, YOU MAY RETAKE THE STAND.

WE'RE BACK ON THE RECORD IN THE MATTER OF CUSKEY AND LONGORIA.

THE RECORD SHALL REFLECT THAT EACH DEFENDANT IS PRESENT IN COURT WITH COUNSEL.

THE PEOPLE REPRESENTED.

SERGEANT, YOU ARE STILL UNDER OATH.

THE WITNESS: YES, SIR.

KEITH WALL,

HAVING BEEN PREVIOUSLY SWORN, RESUMED THE STAND AND TESTIFIED FURTHER AS FOLLOWS:

THE COURT: YOU MAY RESUME YOUR EXAMINATION.

MR. ESCOBEDO: THAT WOULD BE ME, YOUR HONOR?

THE COURT: YES.

[70] MR. ESCOBEDO: OKAY.

REDIRECT EXAMINATION BY MR. ESCOBEDO:

Q DETECTIVE WALLS, I'M GOING TO ASK YOU TO REFER TO PAGE --

THE COURT: THAT'S WALL, ISN'T IT? NO –

THE WITNESS: NO "S".

MR. ESCOBEDO: THANK YOU.

Q PAGE 8 OF YOUR AFFIDAVIT, SPECIFICALLY, LINE 13, ARE YOU THERE?

A PARDON ME?

Q ARE YOU THERE?

A PAGE 8, YES, SIR.

Q LINE 13.

NOW, YOU INDICATED IN YOUR AFFIDAVIT THAT DEPUTY SIMPKINS AND SPITULSKI PERSONALLY ADVISED YOU – ME – OF THEIR OBSERVATIONS.

OKAY.

THAT'S CORRECT?

A YES, SIR.

Q OKAY.

SO THEY TOLD YOU EVERYTHING THAT THEY FELT WAS IMPORTANT ABOUT THE SCENE, CORRECT?

MS. NAJERA: OBJECTION, CALLS FOR SPECULATION FROM THIS WITNESS.

[71] THE COURT: SUSTAINED.

Q BY MR. ESCOBEDO: AT ANY TIME, DID OFFICERS – DEPUTY SIMPKINS ADVISE YOU OF TIRE INDENTATIONS ON THE ASPHALT?

MS. NAJERA: I'M GOING TO OBJECT. VAGUE AS TO ASPHALT ON THE DRIVEWAY OR ASPHALT ON THE STREET.

Q BY MR. ESCOBEDO: DID – AT ANY TIME, DID DEPUTY SIMPKINS POINT OUT TO YOU, TELL YOU ABOUT INDENTATIONS ON THE STREET?

BEING THIRD STREET.

A I – I REMEMBER JUST TRACKS OR MARKS. I DON'T REMEMBER THE WORD, INDENTATIONS, SPECIFICALLY.

Q SO ACCORDING TO YOUR TESTIMONY THEN, IN YOUR MEMORY, YOU ONLY OBSERVED TIRE TRACKS?

A ACTUALLY, DEPUTY SIMPKINS AND SPITULSKI RELAYED ME THEIR OBSERVATIONS. I DID NOT WALK THE DRIVEWAY TO LOOK FOR THE SAME MARKS.

Q OKAY.

NOW, IN YOUR AFFIDAVIT, YOU INDICATED – AND THE WORDING HERE IS VERY IMPORTANT. YOU – ON – REFERRING TO PAGE 6, LINE 2 – EXCUSE ME.

PAGE 5 – I'M SORRY. PAGE 5, LINES 22 AND 23.

YOU INDICATED THAT THE DEPUTIES DISCOVERED A WHITE PICKUP TRUCK PARKED ON THE STREET [72] ACROSS FROM 214. NOW, YOU HAVE TESTIFIED THAT 214 WAS INCORRECT, CORRECT?

A YES.

Q THAT YOU MEANT TO SAY 241?

A NO, THAT'S NOT WHAT I TESTIFIED TO.

ACTUALLY. I SAID THE TRUCK WAS PARKED IN FRONT OF 241 BUT I READ THE ADDRESS OFF SOME NUMBERS PAINTED ON THE OPPOSITE SIDE OF THE STREET THAT SAID 241 (SIC). AND I BELIEVE I TRANSPOSED IT AND PUT 214. I DON'T REMEMBER. I DIDN'T REMEMBER AT THAT POINT SEEING 241 WHERE THE TRUCK WAS PARKED. BUT I REMEMBER I LOOKED – I VIVIDLY REMEMBER LOOKING ACROSS THE STREET AND I SAW SOME NUMBERS PAINTED ON THE CURB. AND I THOUGHT I WROTE THEM DOWN CORRECTLY, BUT AFTER RECHECKING THE AREA, I BELIEVE I TRANSPOSED 234 –

Q 41.

A – TO 214.

Q OKAY.

A I BELIEVE I CHANGED THE 3 TO A 1, AND I SAID – THOUGH THE TRUCK IS, INDEED, PARKED – THE ADDRESS WOULD BE CLOSER TO 241, BUT I TOOK THE NUMBERS FROM ACROSS THE STREET.

Q SO THE STREET WAS – THE VEHICLE WAS NEAR 241 ON THE WEST SIDE OF THE STREET?

A FACING SOUTH, YES, SIR.

Q SO IF YOU HAD – YOU ARE SAYING [73][1] YOU GOT THEM MIXED UP. BUT THE PARK – THE TRUCK WAS NOT PARKED ACROSS THE STREET FROM 241, CORRECT?

A NO. I SAID IT WAS PARKED ACROSS THE STREET FROM WHAT I THOUGHT WAS 2 – WELL, I, APPARENTLY, TRANSPOSED THE 3 INTO A 1. I SAW 234, WHICH IS ON THE EAST SIDE, AND IT WAS PARKED ACROSS FROM THAT, WHICH I COME TO LATER FIND OUT IS ACTUALLY 241 OR CLOSE TO IT.

Q I UNDERSTAND THAT.

A IF THAT MAKES SENSE.

Q YOU LOOKED ACROSS FROM THE WEST SIDE TO THE EAST SIDE, SAW 234?

A YES, SIR.

Q NOW, HAVE YOU HAD AN OPPORTUNITY TO GO BACK OUT TO THAT SCENE?

A YES.

Q AND WHEN YOU OBSERVED WHATEVER YOU DID, DID YOU SEE ANY TIRE – OR EXCUSE ME – INDENTATIONS MADE ON THE PAVEMENT ON THIRD STREET?

MS. NAJERA: I'M GOING TO OBJECT, IR-RELEVANT, IF IT WAS AT A LATER TIME.

THE COURT: SUSTAINED.

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[1] Page 73 was inadvertently omitted from the original record.

MR. ESCOBEDO: THERE IS TESTIMONY – NOTHING FURTHER, YOUR HONOR.

MR. POPE: A COUPLE QUESTIONS, PLEASE, YOUR HONOR, PLEASE.

[74] RECROSS-EXAMINATION

BY MR. POPE:

Q SIR, WHEN YOU GOT THE CALL TO GO TO THE SCENE, YOU MET SIMPKINS AND SPITULSKI THERE, IS THAT CORRECT?

A YES, SIR.

Q AND WAS THE FIRST THING THAT YOU SAW WHEN YOU ARRIVED THE WHITE PICKUP TRUCK?

A YES, SIR.

Q AND WHAT WAS THE CONDITION OF THE – THE WHEELS, THE TIRES?

A I BELIEVE THERE WAS TWO OR THREE SPACE SAVERS – LET ME REFER TO MY AFFIDAVIT JUST TO REFRESH MY MEMORY, IF I CAN, FOR A MINUTE.

THERE WAS TWO SPACE SAVER TYPE SPARES AND A – ONE WHITE SPOKED WHEEL WITH A SONIC (PHONETIC) BRAND TIRE AND A FIRESTONE BRAND TIRE ON THE RIGHT REAR.

Q WHAT WERE THE TWO FRONT TIRES, IF YOU RECALL?

A I BELIEVE THERE WAS ONE SPACE SAVER AND ONE WHITE SPOKE.

Q ALL RIGHT.

AND WHAT WAS THE – THE CONDITION OF EACH OF THOSE TIRES?

A I SEEM TO RECALL THAT THE SPACE SAVER WAS VERY LOW OR FLAT. AND I DON'T – THE – ONE OF THEM WAS LOW OR FLAT. I DON'T REMEMBER WHICH [75] ONE.

I THINK IT WAS THE SPACE SAVER, BUT I DON'T REALLY REMEMBER.

Q THERE WAS DEFINITELY AIR IN BOTH TIRES, IS THAT A FAIR STATEMENT?

A I JUST REMEMBER ONE OF THEM – ONE – I THINK IT WAS JUST ONE OF THEM WAS VERY LOW OR FLA[T], BUT I DON'T REMEMBER HOW MUCH, HOW FLAT IT WAS.

Q DID THE TIRE, THE FLAT ONE, THE LOW ONE, HOWEVER YOU DESCRIBE IT, WAS THAT TIRE CUT THROUGH BY THE RIM?

A I REALLY DON'T REMEMBER.

Q DID – DID – DID EITHER OF THE OTHER TWO OFFICERS TELL YOU THAT THE – THE – THE – THE TIRE WAS CUT THROUGH WITH THE RIM?

A I DON'T REMEMBER THAT, NO.

Q DID – DID EITHER OFFICER POINT TO SOMETHING ON THE GROUND AS THEIR INDICATION TO YOU THAT, THAT WAS THE MANNER BY WHICH THEY TRACED THE SOURCE OF THIS VEHICLE?

A I BELIEVE IT WAS DESCRIBED TO ME, BUT I DON'T – I DON'T RECALL POINTING IT OUT AT THAT POINT.

Q ALL RIGHT.

IF YOU HAD BEEN SHOWN SOME EVIDENCE THAT THERE HAD BEEN A VEHICLE MOVED ALONG THE STREET, YOU WOULD HAVE NOTED THAT, WOULD YOU NOT?

[76] A MOST LIKELY.

WELL, LET ME BACK UP.

IF I WAS – IF I HAD RETRACED IT MYSELF, I PROBABLY WOULD HAVE NOTED IT. I RELIED ON THE DEPUTIES' DESCRIPTION TO ME FOR VARIOUS OTHER REASONS.

Q SO I TAKE IT THEN THAT YOU WERE NOT SHOWN A RETRACING OF THIS ALLEGED TRACK, GOUGE, SCRAPE IN THE ROAD, CORRECT?

MS. NAJERA: I'M GOING TO OBJECT, VAGUE AS TO WHERE. ON THE DRIVEWAY OR ON THE STREET?

MR. POPE: I'LL WITHDRAW AND REPHRASE THE QUESTION.

THE COURT: ALL RIGHT.

Q BY MR. POPE: AT ANYTIME YOU WERE OUT THERE, DID ANYBODY POINT TO YOU ANY MARKS THAT THAT THEY CLAIMED TO BE MADE BY THE VEHICLE THAT WAS TAKEN IN FRONT OF CUSKEY'S HOUSE OR CUSKEY'S – TAKEN TO THE PLACE

WHERE IT WAS ULTIMATELY LOCATED BY THE POLICE?

A WELL, IT WASN'T SO MUCH AS POINTED OUT TO ME, RATHER THAN DESCRIBED TO ME. AND MY FOCUS AT THAT POINT BECAME MORE ON THE TRUCK AND CONDITION OF THE TRUCK AT THAT POINT.

Q IF WE CAN BACK UP FOR A MINUTE?

A SURE.

Q DID YOU AT ANY TIME LOOK ON THE GROUND AND SEE ANY KIND OF MARKINGS WHICH YOU [77] ASSOCIATED WITH MOVEMENT OF THE VEHICLE?

A I DID NOT SPECIFICALLY CHECK MYSELF, NO.

Q ALL RIGHT.

DID EITHER OF THE OFFICERS DIRECT YOUR ATTENTION TO MARKINGS ON THE GROUND WHICH THEY FELT WERE ASSOCIATED WITH MOVEMENT OF THE VEHICLE?

A I REMEMBER THEM INDICATING THAT THERE WERE MARKINGS OVER ON THE DRIVEWAY. I DON'T REMEMBER HAVING A CONVERSATION NECESSARILY ABOUT THE ACTUAL ASPHALT STREET OUT – AWAY FROM THE DRIVEWAY.

BUT I DO SPECIFICALLY REMEMBER TELLING THEM THAT AT THAT POINT I WAS NOT GOING TO WALK DOWN THE DRIVEWAY MYSELF AND BRING MORE ATTENTION TO THE LOCATION BECAUSE I

FELT AT THAT POINT OFFICER SAFETY AND POSSIBLE – THE POSSIBILITY OF RETREIVING ANY STOLEN PROPERTY AT A LATER TIME MIGHT BE JEOPARDIZED BY BRINGING MORE ATTENTION TO THAT DRIVEWAY AND TO CLOSELY EXAMINING MARKS ON THAT DRIVEWAY.

Q SO I TAKE IT, THOUGH, YOU DID NOT SEE ANY MARKINGS ON THIRD STREET?

A NO, I WAS NOT SPECIFICALLY LOOKING FOR THEM. BUT I DID NOT – I DID NOT RETRACE THE STEPS, NO.

Q AND NOBODY POINTED OUT MARKINGS ON THIRD STREET TO YOU, DID THEY?

A I DON'T RECALL THAT, NO. I [78] REMEMBER MARKINGS BEING POINTED OUT TO OR BEING DESCRIBED OVER ON THE DRIVEWAY SPECIFICALLY.

Q DID YOU GO AND LOOK AT MARKINGS ON THE DRIVE – ON THE ASPHALT DRIVEWAY – OR, EXCUSE ME – ON THE DRIVEWAY WHICH WE'RE NOT GIVING A NAME THAT'S COMING OFF THIRD STREET?

A RIGHT.

Q DID YOU SEE MARKINGS ON –

A ACTUALLY, AT THAT POINT, I DID NOT GO OVER TO EXAMINE THEM BECAUSE I DID NOT WANT TO DRAW MORE ATTENTION TO THE INVESTIGATION.

Q THE – YOU DID OBSERVE A – AN AREA ON THE GROUND WHICH YOU THOUGHT HAD BEEN RAKED AND WATERED DOWN, CORRECT?

A THAT'S NOT CORRECT. ACTUALLY, AT THIS POINT, DEPUTY SIMPKINS AND SPITULSKI MADE THAT OBSERVATION. THEY INFORMED ME OF THEIR OBSERVATIONS.

Q AND THE IMPLICATION WAS THAT SOMETHING HAD BEEN BURIED THERE, IS THAT CORRECT?

A NOT NECESSARILY. YOU COULD DRAW ONE OF SEVERAL IMPLICATIONS. THAT COULD BE ONE OF THEM. ALSO, IT COULD BE USED TO COVER UP POSSIBLY TIRE OR RIM MARKS. IT COULD BE USED TO RAKE OVER POSSIBLY AN OIL TRAIL COMING FROM THE PROPERTY. IT COULD BE SEVERAL DIFFERENT THINGS. THAT'S WHY I NEEDED TO DO A LITTLE MORE INVESTIGATION BEFORE NECESSARILY JUMPING TO A CONCLUSION.

Q THAT AREA THAT HAD BEEN RAKED AND [79] WATERED, HOW FAR BACK FROM THE PROPERTY LINE WAS IT?

MS. NAJERA: I'M GOING TO OBJECT. THIS IS IRRELEVANT WITH THIS WITNESS.

THE COURT: OVERRULED.

IF HE KNOWS WHERE THE PROPERTY LINE IS LOCATED.

IT'S CLOSE TO THE GATE?

Q BY MR. POPE: I'LL REPHRASE THE QUESTION, YOUR HONOR.

THERE IS A GATE AND A FENCE THAT SEPARATE CUSKEY'S PROPERTY FROM THIS ACCESS ROAD/ DRIVEWAY, CORRECT?

A YES, SIR.

Q NOW, THE AREA THAT HAD BEEN – APPEARED TO HAVE BEEN RAKED OVER AND WATERED, HOW FAR BACK FROM THAT FENCE LINE WAS THAT AREA?

A I'M NOT REALLY SURE.

Q WELL, IT WAS NOT ADJACENT TO THE FENCE LINE, WAS IT?

A I REALLY DON'T KNOW.

Q IN FACT, IT WAS ABOUT 30 FEET; WASN'T IT?

MS. NAJERA: I'M GOING TO OBJECT IF THIS WITNESS DOESN'T KNOW WHERE IT WAS.

THE COURT: THAT SEEMS TO BE THE RESPONSE, COUNSEL.

MR. POPE: I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

[80] THE COURT: ANYTHING FURTHER FROM THIS WITNESS.

MS. NAJERA: NO, YOUR HONOR.

MR. ESCOBEDO: NO, YOUR HONOR.

THE COURT: THANK YOU, SERGEANT.

THE WITNESS: THANK YOU, SIR.

(THE COURT HEARD OTHER UNRELATED CALENDAR MATTERS.)

THE COURT: YOU MAY CALL YOUR NEXT WITNESS.

MR. ESCOBEDO: DEFENSE WOULD LIKE TO CALL, RICHARD CEBALLOS.

MS. NAJERA: YOUR HONOR, I'M GOING TO OBJECT TO DEFENSE CALLING MR. CEBALLOS.

THE COURT: OFFER OF PROOF?

MR. ESCOBEDO: YOUR HONOR, MR. CEBALLOS WAS A WITNESS TO THIS. HE WENT OUT TO THE LOCATION, CAN VERIFY THE DISTANCES, CAN VERIFY THE CONDITION OF THE ROAD, CAN VERIFY WHERE THE ADDRESSES ARE LOCATED. AND HE CAN TESTIFY AS TO THE CONDITION OF THE ROADWAY AND WHETHER OR NOT, IN HIS OPINION, TRACKS COULD BE – I KNOW HE'S NO EXPERT, BUT HE CAN TESTIFY AS TO THE CONDITION OF THE ROADWAY. I THINK THAT'S RELEVANT BECAUSE AT THIS TIME, WE DON'T HAVE ANY – ANY THIRD PARTY TO TESTIFY AS TO WHAT THAT LOCATION WAS REALLY ALL [81] ABOUT.

THE COURT: ISN'T THE ROADWAY AS DEPICTED IN THE VIDEO THAT THE COURT SAW?

MR. ESCOBEDO: YES. BUT THAT VIDEO DOESN'T DO TRUE JUSTICE BECAUSE YOU ACTUALLY HAVE TO BE ON TOP OF IT, BECAUSE IT VARIES IN MATERIAL. IT GOES FROM CONCRETE TO ASPHALT TO GRAVEL TO DIRT. AND I BELIEVE –

THE COURT: I COULD TELL THAT FROM THE VIDEO.

MR. ESCOBEDO: HE CAN ALSO TESTIFY AS TO WHETHER IT WOULD – YOU KNOW, EVEN POSSIBLE WHETHER TRACKS COULD LEAD OUT FROM THE DRIVEWAY ONTO THE ROADWAY, THIRD STREET AND TRAVERSE, YOU KNOW, 40, 50 FEET DOWN TO 241 OR THEREABOUTS. HE CAN ALSO TESTIFY AS TO THE – THE – THE CONDITION OF THE BACKYARD, WHAT TYPE OF THINGS ARE BACK THERE.

THE COURT: AS OF WHAT DATE?

MS. NAJERA: AS OF A FEW DAYS AGO, YOUR HONOR.

MR. ESCOBEDO: THIS WAS A FEW DAYS AGO, BUT –

THE COURT: COUNSEL, WHY IS THAT MATERIAL AT ALL TO THE COURT'S DETERMINATION HERE?

MR. ESCOBEDO: BECAUSE, YOUR HONOR, I'M TRYING TO ESTABLISH WHEN THIS AFFIDAVIT WAS WRITTEN –

THE COURT: WHICH WAS ON WHAT DATE?

[82] MR. ESCOBEDO: AUGUST 3RD, I BELIEVE.

THE COURT: OF '99?

MS. NAJERA: UM-HUM.

THE COURT: AND YOU WANT HIM TO TESTIFY TO CONDITIONS AS THEY EXISTED A FEW DAYS AGO?

MR. ESCOBEDO: THE DEPUTY FAILED TO INCLUDE IN HIS AFFIDAVIT THE FACT THAT THIS YARD WAS LITTERED WITH HUNDREDS OF AUTO PARTS.

THE COURT: BUT HOW DOES DEPUTY D.A. CEBALLOS' TESTIMONY ASSIST THE COURT IN THAT REGARD IF HE MADE OBSERVATIONS A FEW DAYS AGO AND THIS AFFIDAVIT WAS BASED ON OBSERVATIONS IN AUGUST OF '99?

MR. ESCOBEDO: HE CAN CONFIRM THE EXISTENCE OF ALL THESE AUTO PARTS BACK THERE.

THE COURT: AS TO THAT DAY?

MR. ESCOBEDO: AS TO THAT DAY.

THE COURT: THE COURT WILL SUSTAIN THE OBJECTION IF THAT'S – I'LL GO POINT BY POINT. IF YOU ARE TALKING ABOUT THE CONDITION OF WHAT'S CONTAINED IN THE YARD TODAY, THE OBJECTION IS SUSTAINED.

MR. ESCOBEDO: OKAY.

YOUR HONOR, WITH REGARDS TO THE MATERIAL, THE ROADWAY MATERIAL – STRIKE THAT.

WITH REGARDS TO THE CHARACTERIZATION OF THIS DRIVEWAY, I THINK DEPUTY WALL MISLED COMMISSIONER FALLS – JUDGE FALLS – IN [83] CHARACTERIZING THIS AS A DRIVEWAY. THIS

CLEARLY WAS NOT A DRIVEWAY. THIS WAS AN ACCESS ROAD, SOMETHING PEOPLE –

THE COURT: WELL, THE COURT SAW THAT THIS – THE COURT SAW THAT. I DON'T NEED THE D.A.

MR. ESCOBEDO: HE CAN TESTIFY –

THE COURT: ONE MOMENT. LET ME TAKE THAT ONE POINT.

IT LOOKS LIKE, FIRST OF ALL, IT APPARENTLY CANNOT BE READILY DETERMINED WHETHER OR NOT THIS IS CITY OR COUNTY PROPERTY. IT SEEMS MORE LIKE AN ACCESS ROAD OR EVEN IT COULD BE A COMMON DRIVEWAY FOR ALL THE RESIDENTS THERE. I DON'T KNOW HOW MANY RESIDENCES ARE ON EACH SIDE OR BEHIND, IN ADDITION TO THE SUBJECT PROPERTY HERE, BUT I MEAN WHAT DIFFERENCE DOES THAT MAKE, WHETHER WE CALL IT A DRIVEWAY OR OTHER – ACCESS ROAD?

MR. ESCOBEDO: WELL, I THINK HE COULD TESTIFY AND SHOW THAT IT WAS – THE DEPUTIES WERE MISLEADING THE COURT FROM THE GET-GO BY CHARACTERIZING THIS AS A SMALL DRIVEWAY.

THE COURT: WELL, IT IS A SMALL ACCESS ROAD.

MR. ESCOBEDO: WELL, IT'S 30 FEET WIDE, 200 – 300 FEET LONG. AND –

THE COURT: WELL, THE POINT BEING IT'S NOT A STREET, RIGHT?

AND THE COURT COULD SEE FROM THE [84] VIDEO THAT WHOEVER WAS MAKING THE VIDEO, I DON'T KNOW WHO WAS PREPARING THAT VIDEO OR ACTUALLY PHOTOGRAPHING THE AREA THERE, BUT IT WAS QUITE CLEAR TO THE COURT THAT YOU COULD CERTAINLY SEE NUMEROUS TIRE TRACKS. AND IT APPEARS AS IF THE CAMERA PERSON WAS GOING TO OTHER AREAS BUT THE ROADWAY WHERE THE TIRE TRACKS WERE LOCATED. I DON'T KNOW WHEN THAT VIDEO WAS PREPARED, BUT, CLEARLY, THAT ACCESS ROAD, YOU CAN DETERMINE TIRE TRACKS AND IMPRESSIONS FROM THAT.

YOU CAN LOOK AT THAT AGAIN, AND I'LL POINT OUT WHAT I'M REFERRING TO, IF YOU WOULD LIKE.

MR. ESCOBEDO: OKAY.

THE COURT: YOU WANT TO DO THAT?

MR. ESCOBEDO: SURE, YOUR HONOR, I'D LIKE TO REVIEW THAT TAPE.

THE COURT: ALL RIGHT.

MR. ESCOBEDO: WITH REGARD TO THE CHARACTERIZATION AS TIRE TRACKS IN THE AFFIDAVIT, DEPUTY CEBALLOS WAS CONTACTED BY DEPUTY WALL, WHO INFORMED DEPUTY CEBALLOS THAT, IN FACT, THEY WERE NOT TIRE TRACKS, THAT THEY WERE MORE LIKELY TO BE CHARA[C]TERIZED AS A – GOUGES, TIRE GOUGES.

THE COURT: NOW, ARE WE TALKING ABOUT ON THE STREET OR ARE WE TALKING ABOUT ON THE ACCESS ROAD?

MR. ESCOBEDO: BOTH, I WOULD ASSUME.

MS. NAJERA: YOUR HONOR, THERE IS NO – [85] NOTHING.

THE COURT: THE TESTIMONY BEFORE THIS COURT, THERE IS SOME SCRATCHES OUT THERE ON THE STREET AND THERE ARE A COMBINATION OF RIM IMPRESSIONS AND TIRE TRACKS ON THE SOFTER PORTIONS OF THE ACCESS ROAD. THAT'S THE EVIDENCE BEFORE THIS COURT.

I REALIZE THAT BOTH COUNSEL HAVE USED THE WORD, GOUGES, ON A COUPLE OF OCCASIONS, BUT NO WITNESS HAS USED OR CONFIRMED THAT TERMINOLOGY, GOUGES. THEY HAVE ALL DESCRIBED WHAT THEY OBSERVED ON THE HARD ASPHALT SUCH AS ON THE MAIN ROADWAY AS A SCRATCH WHICH APPEARED TO BE CAUSED BY A – THE EDGES OF A RIM, WHERE THE RUBBER HAS SEPARATED THEREFROM, AND THE OTHER PORTIONS AS A TIRE TRACK AND THE EDGE OF THE RIM ON THE SOFTER PORTION OF THE ACCESS ROAD. THAT'S WHAT'S BEFORE THIS COURT. THAT'S THE TESTIMONY THAT'S BEFORE THIS COURT. AND, FRANKLY, IT'S NOT INCONSISTENT WITH WHAT'S IN THE AFFIDAVIT.

MR. ESCOBEDO: MR. CEBALLOS CONTACTED WALL, WHO INDICATED THAT HE WANTED TO MODIFY THE WORDING IN THE AFFIDAVIT FROM TIRE TRACKS TO TIRE GOUGES. THAT WAS

REFLECTED IN A REPORT BY MR. CEBALLOS DATED MARCH 6. I THINK THAT'S RELEVANT AS HERE WE'RE –

THE COURT: MARCH 6 OF?

MR. ESCOBEDO: 2000.

THE COURT: 2000.

[86] MR. ESCOBEDO: HERE WE'RE SIX MONTHS LATER –

THE COURT: BECAUSE THE DEPUTY D.A. INTERVIEWS A WITNESS AND SAYS – MAKES THE SUGGESTION THAT HE WANTS TO MODIFY THE AFFIDAVIT TO THE SEARCH WARRANT?

MR. ESCOBEDO: YES.

BECAUSE HERE WE'RE SIX MONTHS LATER, THE AFFIDAVIT WAS WRITTEN WHEN ALL THIS MATERIAL WAS FRESH IN HIS – HIS MIND. HE WROTE DOWN TIRE TRACKS. NOW SINCE WE DO A LITTLE INVESTIGATION, THERE IS NO WAY TIRE TRACKS COULD BE FOLLOWED ON THIS DIRTWAY, HE WANTS TO MODIFY IT AND PUT DOWN TIRE GOUGES.

THE COURT: WHO DOES? WHO DOES?

BECAUSE THE DEPUTY D.A. DOES, THAT GOES TO IN SOME WAY IMPACT –

MR. ESCOBEDO: NO, DETECTIVE WALL.

THE COURT: – IMPACT THIS SEARCH WARRANT AFFIDAVIT?

MR. ESCOBEDO: DETECTIVE WALL REQUESTED THAT THERE BE A MODIFICATION OF THE WORDING.

THE COURT: WELL, I DON'T KNOW WHY THAT WOULD BE NECESSARY. THE WORD, TIRE TRACK, IS PRETTY BROAD AND GENERAL. IF YOU ARE TALKING ABOUT THE TREAD IMPRESSION THAT A TIRE MIGHT LEAVE ON A SURFACE AS OPPOSED – AND IN ADDITION TO WHAT A – THE EDGE OF A RIM MIGHT LEAVE ON A HARDER (SIC) IMPRESSION, TIRE TRACK IS – IS CERTAINLY BROAD [87] ENOUGH TO ENCOMPASS IT ALL.

MR. ESCOBEDO: I WOULD DIFFER WITH THAT, YOUR HONOR.

I THINK IF, IN FACT, THERE WERE TIRE GOUGES, INDENT – WHAT IS THE WORD HERE?

THE COURT: WELL, THERE IS NO TESTIMONY OF ANY GOUGES ANYWHERE.

MR. ESCOBEDO: INDENTATIONS.

IF ON AUGUST 3RD, THERE WAS, IN FACT, INDENTATIONS MADE ON THE ASPHALT, DEPUTY WALL WOULD HAVE OBSERVED THAT, WOULD HAVE PUT IT SPECIFICALLY IN HIS AFFIDAVIT BECAUSE THAT IS CONCRETE –

THE COURT: WE'RE LOSING SIGHT OF WHERE WE ARE HERE. WE'RE TALKING ABOUT THE PROPRIETY OF HAVING THE DEPUTY DISTRICT ATTORNEY TESTIFYING.

MR. ESCOBEDO: I WOULD LIKE TO BRING IN THE DEPUTY D.A.

THE COURT: AND YOU ARE MAKING AN OFFER OF PROOF. AND SO FAR, WHAT THE COURT HAS HEARD, IT'S JUST NOT RELEVANT. BUT I'LL CONTINUE TO HEAR OTHER POINTS YOU INTEND TO RAISE.

NOW, YOU HAVE TALKED ABOUT THE CONDITION – NOW YOU ARE TALKING ABOUT THE CONDITION OF THE PROPERTY TODAY. THAT'S NOT RELEVANT, SIX TO SEVEN MONTHS LATER. IT'S MORE THAN THAT. EIGHT OR NINE MONTHS LATER, AREN'T WE? WHY IS THAT RELEVANT?

MR. POPE: YOUR HONOR, THIS – THIS WORD, [88] GOUGES, IT IS NOT SOMETHING WE INVENTED. THIS IS IN THE MEMO FROM THE DEPUTY DISTRICT ATTORNEY BASED ON A CONVERSATION WHICH HE HAS HAD WITH DETECTIVE WALL.

THE COURT: WAIT, WAIT.

MR. POPE: NOW, THAT WOULD BECOME AN INCONSISTENT STATEMENT IF THEY WANT TO MODIFY IT, THEY SAY, WELL, IT'S NOT TIRE TRACKS, IT'S GOUGES. AND NOW WE HEAR IN COURT, WELL, IT'S NEITHER ONE OF THOSE. IT'S NOT TIRE TRACKS, IT'S NOT GOUGES, IT IS AN INDENTATION.

THE COURT: WELL, THE COURT IS ONLY WANTING TO DETERMINE AT THIS POINT THE OFFER OF PROOF AS TO WHY THE TESTIMONY OF THE DEPUTY D.A. IS NEEDED IN THIS CASE.

THE COURT CAN VIEW THE VIDEO TAPE. I HAVE SEEN THE VIDEO TAPE. I HAVE HEARD THE TESTIMONY OF THE OTHER WITNESSES. THE COURT IS NOT CONCERNED ABOUT THE PRE-EXISTING CONDITION OF THE PREMISES.

SO WHAT'S THE OFFER OF PROOF?

MR. ESCOBEDO: HE WILL INDICATE THE PRIOR – AN INCONSISTENT STATEMENT MADE BY DETECTIVE WALL.

THE COURT: ALL RIGHT.

YOU MAY, CALL HIM FOR THAT PURPOSE.

[89] RICHARD CEBALLOS, CALLED AS A WITNESS ON BEHALF OF DEFENDANT LONGORIA, WAS SWORN AND TESTIFIED AS FOLLOWS:

THE CLERK: WOULD YOU RAISE YOUR RIGHT HAND TO BE SWORN, PLEASE.

YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

THE WITNESS: I DO.

THE CLERK: PLEASE STEP FORWARD AND BE SEATED.

(PAUSE.)

THE CLERK: STATE AND SPELL YOUR FULL NAME FOR THE RECORD, PLEASE.

THE WITNESS: RICHARD CEBALLOS.

THE CLERK: THANK YOU.

THE COURT: YOU MAY PROCEED.

MR. ESCOBEDO: THANK YOU, YOUR HONOR.

[90] DIRECT EXAMINATION

BY MR. ESCOBEDO:

Q MR. CEBALLOS, COULD YOU PLEASE STATE YOUR OCCUPATION FOR THE RECORD.

A DEPUTY DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES.

Q ON MARCH 3RD, YEAR 2000, AT APPROXIMATELY 2:15 P.M., DID YOU SPEAK WITH DETECTIVE WALL?

A YES.

Q OKAY.

AND THIS WAS OVER THE TELEPHONE?

A YES.

Q AND DURING THE COURSE OF YOUR CONVERSATION, DID YOU DISCUSS THIS CASE, PEOPLE VERSUS CUSKEY AND LONGORIA?

A YES.

Q AND DID YOU SPECIFICALLY DISCUSS THE FACT THAT THERE WAS A MOTION PENDING TO QUASH THE SEARCH WARRANT?

A YES.

Q DID YOU THEN QUESTION THE DETECTIVE REGARDING TIRE TRACKS?

A I DID.

Q DID THE DETECTIVE MAKE ANY COMMENT TO YOU REGARDING MODIFYING THE WORD, "TIRE TRACKS"?

A YES, HE DID.

Q AND WHAT WAS THAT COMMENT THAT THE [91] DETECTIVE MADE?

A HE INDICATED TO ME IN RESPONSE TO A QUESTION, THAT AFTER SPEAKING WITH THE DEPUTIES IN THIS CASE, DEPUTY SIMPKINS AND SPITULSKI, THAT HE NEEDED TO OR HE WANTED TO MODIFY THE WORD THAT HE HAD USED IN HIS AFFIDAVIT, THAT HE WANTED TO CHANGE IT FROM TIRE TRACKS TO TIRE GOUGES, WHICH HE EXPLAINED WERE CAUSED BY THE TIRE RIMS RUBBING OR MARKING THE ASPHALT OF THE ROADWAY.

Q AND DID YOU INDICATE TO HIM, MEANING DETECTIVE WALL, THAT IN HIS AFFIDAVIT, HE HAD INDICATED THAT THERE WERE SPECIFICALLY TIRE TRACKS AND NOT TIRE GOUGES?

A I DON'T REMEMBER AT THAT TIME BRINGING IT UP TO HIM. I THINK MY QUESTION TO HIM AT THAT POINT WAS WHEN DID HE AND THE DEPUTIES COME TOGETHER AND DECIDE THAT THAT

NEEDED TO BE MODIFIED. AND HE DIDN'T RESPOND.

Q AND WHAT DO YOU THINK HE MEANT BY MODIFY?

MS. NAJERA: I'M GOING TO OBJECT, YOUR HONOR.

THE COURT: SUSTAINED, IF YOU ARE ASKING HIM WHAT HE MEANT.

MS. NAJERA: CALLS FOR SPECULATION, YEAH.

Q BY MR. ESCOBEDO: NOW, YOU HAD AN OPPORTUNITY TO READ THE AFFIDAVIT BY DETECTIVE WALL, CORRECT?

MS. NAJERA: I'M GOING TO OBJECT TO ANYTHING [92] BEYOND THE SCOPE OF THESE QUESTIONS CONCERNING ANY PRIOR STATEMENTS.

THE COURT: OFFER OF PROOF.

MR. ESCOBEDO: THIS GOES TO WHAT – ANOTHER INCONSISTENT STATEMENT AS TO WHAT WAS WRITTEN IN THE AFFIDAVIT.

MS. NAJERA: I'M GOING TO OBJECT TO ANYTHING THAT ISN'T BASED ON A STATEMENT MADE BY THE OFFICER.

MR. ESCOBEDO: THE AFFIDAVIT WAS A STATEMENT BY –

THE COURT: WELL, AN OUT OF COURT – WELL, A STATEMENT TO THIS WITNESS IS WHAT MISS NAJERA IS ADDRESSING. IS THAT WHAT YOUR QUESTION IS ATTEMPTING TO ADDRESS?

MR. ESCOBEDO: OKAY.

I'LL GO BACK TO THE CURRENT CONVERSATION, YOUR HONOR.

THE COURT: OKAY.

Q BY MR. ESCOBEDO: DID YOU ASK THE DETECTIVE WHETHER HE SPECIFICALLY INCLUDED IN HIS AFFIDAVIT TIRE GOUGES IN HIS DESCRIPTION AS TO THE PATH THAT LEAD FROM THE STOLEN VEHICLE TO THE BACK GATE?

A DID I ASK HIM THAT QUESTION?

Q RIGHT.

A NO, I DON'T BELIEVE I DID.

Q NOW, WAS THIS THE FIRST TIME THAT YOU HEARD THE PHRASE, TIRE GOUGES?

[93] A YES.

Q AND DID YOU ASK HIM WHY, SUDDENLY, HE IS NOW CHANGING THE CHARACTERIZATION OF THOSE MARKS FROM TIRE TRACKS TO TIRE GOUGES?

A WELL, AS I STATED BEFORE, I ASKED HIM AFTER HE TOLD ME THAT HE WANTED TO MODIFY IT FROM TIRE TRACKS TO TIRE GOUGES, I ASKED HIM WHY OR WHEN DID HE AND THE DEPUTIES GET TOGETHER AND DECIDE THAT THAT NEEDED

TO BE MODIFIED FROM TIRE TRACKS TO TIRE GOUGES.

Q AND DID YOU TELL HIM THAT YOU WENT TO THE LOCATION AND OBSERVED THE DRIVEWAY?

MS. NAJERA: I'M GOING TO OBJECT TO ANYTHING NOT DEALING WITH THE STATEMENT MADE BY THE OFFICER.

THE COURT: SUSTAINED, UNLESS YOU HAVE AN INDEPENDENT OFFER OF PROOF.

MR. ESCOBEDO: WELL, YOUR HONOR, THAT WOULD GO TO THE BASIS AS TO WHY HE WAS INQUIRING AS TO, YOU KNOW, TIRE TRACKS, TIRE GOUGES, THE CHARACTERIZATION OF THE MARKS.

THE COURT: WELL, BECAUSE OF THIS WITNESS' IMPRESSIONS OF WHAT HE SAW A FEW DAYS AGO?

MR. ESCOBEDO: CORRECT.

THE COURT: SUSTAINED.

MR. ESCOBEDO: NOTHING FURTHER, YOUR HONOR.

THE COURT: MR. POPE.

[94] CROSS-EXAMINATION

BY MR. POPE:

Q DID YOU CALL THE DEPUTY YOURSELF?

A I DON'T KNOW IF I CALLED HIM AND LEFT A MESSAGE OR IF HE WAS RETURNING MY CALLS.

Q AND THE REASON FOR YOUR CALL WAS YOUR CONCERN OVER WHAT YOU FELT COULD OR COULD NOT BEEN SEEN EITHER ON THE ROAD OR THE DRIVEWAY; IS THAT CORRECT?

MS. NAJERA: I'M GOING TO OBJECT AS IRRELEVANT.

THE COURT: SUSTAINED.

DOESN'T – IT'S JUST NOT RELEVANT WHAT THIS WITNESS COULD HAVE SEEN TODAY OR A FEW DAYS AGO.

Q BY MR. POPE: SIR, WHEN YOU SPOKE WITH THE DETECTIVE, DID YOU TELL HIM THAT YOU FELT THAT YOU COULD NOT SEE TIRE TRACKS?

MS. NAJERA: I'M GOING TO OBJECT TO ANYTHING –

MR. POPE: COULD I WITHDRAW THE QUESTION AND START AGAIN?

THE COURT: YES.

Q BY MR. POPE: WHEN YOU CALLED – WHEN YOU SPOKE WITH THE DEPUTY, DID YOU TELL HIM THAT YOU FELT THAT, IN YOUR OPINION, IT WAS SOMEWHAT IMPLAUSIBLE THAT TIRE MARKS COULD BE SEEN ON THIS DRIVEWAY?

MS. NAJERA: I'M GOING TO OBJECT AS –

[95] THE COURT: SUSTAINED.

MR. POPE: YOUR HONOR, THAT –

THE COURT: THIS WITNESS' OPINION IS NOT RELEVANT AS TO THIS COURT'S DETERMINATION.

MR. POPE: AS AN OFFER OF PROOF, YOUR HONOR, THIS WOULD GO TO –

THE COURT: WAIT A MINUTE.

WHETHER OR NOT HE BELIEVES IT'S IMPLAUSIBLE THAT IT COULD HAVE HAPPENED THE WAY IS ARTICULATED IN THE AFFIDAVIT IS NOT RELEVANT.

MR. POPE: YOUR HONOR – YOUR HONOR, IT'S NOT BEING OFFERED FOR THE PROOF OF WHAT HE IS SAYING, RATHER, IT IS GOING TO WHY HE WOULD ASK THE QUESTION OF THE DEPUTY, BECAUSE HE FELT THAT IT NEEDED SOME EXPLANATION. AND THE DEPUTY WOULD THEN TURN AROUND AND SAY – AND SAY, OKAY. TIRE TRACKS, NO. NO, NOT TIRE TRACKS. YOU MIGHT BE RIGHT, MAYBE THEY CAN'T BE SEEN. BUT WE WILL GO WITH GOUGES BECAUSE THOSE CANNOT BE DISPUTED. THAT'S THE BASIS FOR MY QUESTION TO THIS DEPUTY, YOUR HONOR.

THE COURT: ALL RIGHT.

THE WITNESS: CAN YOU RESTATE THE QUESTION? SORRY.

MR. POPE: I'LL TRY.

Q WHEN YOU INITIATED CONVERSATION WITH THE DEPUTY, DID YOU INDICATE TO HIM YOUR CONCERN THAT TIRE MARKS WOULD BE

VERY DIFFICULT TO SEE ON THE GRAVEL DRIVEWAY?

[96] A YES, I DID.

Q AND WAS IT AFTER THAT, THAT HE INDICATED TO YOU THAT THERE SHOULD BE A CHANGE IN THE AFFIDAVIT?

A YES.

MR. POPE: I HAVE NOTHING FURTHER.

CROSS-EXAMINATION

BY MS. NAJERA:

Q MR. CEBALLOS, HOW MANY CONVERSATIONS DID YOU HAVE WITH DETECTIVE WALL?

A I HAD TWO CONVERSATIONS WITH HIM OVER THE PHONE AND ANOTHER CONVERSATION OR MEETING IN PERSON.

Q OKAY. AND WHEN YOU DISCUSSED THE STATEMENT THAT YOU PLACED IN A MEMO DATED MARCH 2ND OF THE YEAR 2000, HOW LONG WAS THAT CONVERSATION?

A PROBABLY NO MORE THAN FIVE, MAYBE TEN MINUTES, AT MOST. IT WASN'T VERY LONG.

Q AND IN THE COURSE OF THAT FIVE TO TEN-MINUTE CONVERSATION, DID YOU SPECIFICALLY DISCUSS WITH DEPUTY WALL THE ASPHALT STREET VERSUS THE – WHAT WE'RE CALLING THE DRIVEWAY?

A I'M SORRY. I'M – MAYBE I DIDN'T FOLLOW YOUR QUESTION.

Q THE COURSE OF THAT FIVE OR SO MINUTE CONVERSATION THAT YOU HAD WITH DEPUTY WALL, DID YOU [97] SPECIFICALLY ASK HIM ABOUT THE ASPHALT STREET AND THEN THE DRIVEWAY?

A I BELIEVE I DID.

Q BUT DO YOU KNOW FOR CERTAIN RIGHT NOW AS YOU SIT THERE?

A NO.

Q DO YOU RECALL GOING INTO DETAIL WITH HIM OVER WHAT MARKINGS WOULD HAVE BEEN MADE IN THE ASPHALT STREET?

A YOU ARE REFERRING TO THE FIRST, CONVERSATION OR THE SECOND?

Q NO, I'M TALKING ABOUT THE CONVERSATION THAT YOU REPORTED IN YOUR ADDENDUM DATED MARCH 2ND.

A RIGHT.

I EXPLAINED TO DETECTIVE WALL –

Q WHAT I'M ASKING YOU IS DID YOU SPECIFICALLY DISCUSS WITH HIM THE ASPHALT STREET OR DID YOU DISCUSS WITH HIM THE DRIVEWAY?

A ARE WE TALKING ABOUT –

MR. POPE: OBJECTION, COMPOUND.

THE COURT: IT'S NOT COMPOUND. IT'S IN THE DISJUNCTIVE, DID HE DISCUSS THE DRIVEWAY OR THE ASPHALT STREET.

THE WITNESS: WE WERE TALKING ABOUT THE SO-CALLED DRIVEWAY.

Q BY MS. NAJERA: DID YOU EVER DISCUSS THE – OR DO YOU RECALL EVER DISCUSSING THE ASPHALT STREET WITH HIM?

[98] A NO.

Q DO YOU KNOW IF HE WAS TALKING ABOUT THE ASPHALT STREET WHEN HE WAS TALKING TO YOU ABOUT WHAT HE OBSERVED OR WHAT WAS OBSERVED BY –

MR. POPE: OBJECTION, CALLS –

MS. NAJERA: – OR WHAT WAS OBSERVED BY SPITULSKI AND SIMPKINS?

MR. POPE: CALLS FOR SPECULATION.

THE COURT: YOU'LL HAVE TO REPHRASE THAT, MISS NAJERA.

MS. NAJERA: OKAY.

Q DO YOU – HOW CAN YOU SIT THERE AND TELL US NOW WHETHER OR NOT DEPUTY WALL KNEW THAT YOU WERE TALKING ABOUT THE ALLEYWAY VERSUS THE STREET?

A I THINK IT WAS VERY CLEAR IN OUR CONVERSATION WE WERE TALKING –

Q WAS IT CLEAR TO YOU –

THE COURT: ONE MOMENT.

MR. POPE: OBJECTION.

THE COURT: LET THE WITNESS RESPOND.

IT WAS CLEAR WHAT, MR. CEBALLOS?

THE WITNESS: IT SEEMED VERY CLEAR DURING OUR CONVERSATION WE WERE TALKING ABOUT THIS AREA CALLED THE DRIVEWAY.

Q BY MS. NAJERA: THIS IS BECAUSE IT WAS CLEAR IN YOUR MIND, IS THAT CORRECT?

MR. POPE: OBJECTION, ARGUMENTATIVE.

THE COURT: OVERRULED.

[99] THE WITNESS: YES.

Q BY MS. NAJERA: WITH REGARD TO DEPUTY WALL HERE, YOU WERE TALKING TO HIM FOR ALL ABOUT FIVE MINUTES, RIGHT?

MR. POPE: OBJECTION, MISSTATES THE TESTIMONY.

THE COURT: OVERRULED.

THE WITNESS: FIVE TO TEN MINUTES.

Q BY MS. NAJERA: AND AT THAT TIME, YOU WERE ACCUSING HIM OF SOME THINGS, WEREN'T YOU?

A NO, I WASN'T ACCUSING HIM OF ANYTHING. I WAS TRYING TO CLARIFY AND ASK HIM QUESTIONS ABOUT THE WARRANT AND THE AFFIDAVIT.

I WAS TRYING TO CLARIFY SOME OF THE STATEMENTS THAT WERE MADE IN THE AFFIDAVIT AND ASKING HIM QUESTIONS OR HAVING HIM RESPOND TO SOME OF THE ALLEGATIONS THAT THE DEFENSE WAS MAKING.

Q AND IN YOUR DESIRE TO CLARIFY THINGS, DID YOU TALK TO DEPUTY SPITULSKI?

A NO, I DIDN'T.

Q DID YOU TALK TO DEPUTY SIMPKINS?

A NO, I DIDN'T.

MS. NAJERA: NOTHING FURTHER.

CROSS-EXAMINATION (RESUMED.)

BY MR. POPE:

Q DEPUTY SPITULSKI AND SIMPKINS DIDN'T SIGN THE AFFIDAVIT, DIDN'T PREPARE THE WARRANT, DID [100] THEY?

A NO, IT WAS SIGNED BY SERGEANT WALL.

MR. ESCOBEDO: NOTHING FURTHER.

MS. NAJERA: NOTHING FURTHER.

THE COURT: THANK YOU, SIR.

YOU MAY STEP DOWN.

MR. ESCOBEDO: NO FURTHER WITNESSES, YOUR HONOR.

THE COURT: MR. POPE, YOU HAVE ANY WITNESSES?

MR. POPE: NO, YOUR HONOR.

BUT I WOULD OFFER INTO EVIDENCE –

THE COURT: ONE MOMENT.

WILL THERE BE ANY REBUTTAL WITNESSES?

MS. NAJERA: NO, YOUR HONOR.

THE COURT: ALL RIGHT.

YES, MR. POPE.

MR. POPE: YES.

YOUR HONOR, I WOULD LIKE TO OFFER INTO EVIDENCE THE AFFIDAVIT OF MY CLIENT, MR. CUSKEY. IT PROVIDES SOME OF THE BACKGROUND CONCERNING HIS RELATIONSHIP WITH, I BELIEVE, IT'S SIMPKINS, AND – THAT – FOR THAT PURPOSE.

THE COURT: ANY OBJECTION?

MS. NAJERA: I WOULD OBJECT, YOUR HONOR.

THE COURT: IT IS SUSTAINED. I DON'T HAVE ANY LEGAL BASIS UPON WHICH TO ASSUME SUCH AN [101] AFFIDAVIT, MR. POPE.

MR. POPE: IF I MAY JUST HAVE A MOMENT, PLEASE?

THE COURT: UNLESS YOU WANT TO POINT THE COURT'S ATTENTION TO SOME LEGAL BASIS FOR RECEIVING IT.

(PAUSE.)

MR. POPE: NO, YOUR HONOR. WE WILL – WE WILL REST.

THE COURT: ALL RIGHT.

ARGUMENT.

MR. ESCOBEDO: YOUR HONOR, OUR POSITION, THE DETECTIVES AND DEPUTIES IN THIS MATTER DELIBERATELY MISLED THE MAGISTRATE WITH DELIBERATE FALSEHOODS AND INTENTIONALLY OMITTED MATERIAL INFORMATION. SPECIFICALLY, IN THE AFFIDAVIT WHICH DETECTIVE WALL PREPARED, HE INDICATED THAT THE STOLEN VEHICLE WAS FOUND AT 214. NOW, I KNOW THERE HAS BEEN TESTIMONY REGARDING IT WAS A SIMPLE MISTAKE, HE MADE A MISTAKE, THAT HE MEANT TO SAY 234 AND SOMEHOW WRITES 214. I – MY POSITION IS, YOUR HONOR, THAT THE OFFICER DELIBERATELY WROTE DOWN AND INCLUDED IN HIS AFFIDAVIT 214. WHY? BECAUSE THAT WOULD PLACE THE STOLEN VEHICLE DIRECTLY IN FRONT OF THE ALLEYWAY.

THE COURT: KNOWING THAT THERE IS NO 214. WHY WOULD HE DO THAT?

[102] MR. ESCOBEDO: CORRECT, YOUR HONOR.

THE COURT: WHY?

MR. ESCOBEDO: BECAUSE THAT WOULD SUPPORT HIS THEORY THAT TRACKS COULD THEN BE FOLLOWED FROM THE DRIVEWAY/ROADWAY ACROSS THE 40 FOOT WIDE PAVED PUBLIC ROAD TO THE STOLEN VEHICLE. IT'S A LOT EASIER TO

MAKE THAT ARGUMENT REGARDING THE TRACKS BY PLACING THE VEHICLE THERE RATHER THAN APPROXIMATELY 50 FEET DOWN THE ROAD TO WHERE 241 IS.

THE COURT: YOU MEAN 30 TO 40 FEET.

MR. ESCOBEDO: WELL, YOUR HONOR, I BEG WITH THAT DESCRIPTION. I THINK IT'S LONGER THAN THAT.

THE COURT: WELL, I'M ONLY GOING BY THE EVIDENCE BEFORE THE COURT. I DON'T – THIS IS THE FIRST TIME I HAVE HEARD THIS 50 FEET.

MR. ESCOBEDO: WELL, YOU CAN LOOK AT THE VIDEO AND JUDGE THAT.

ADDITIONALLY, THE BASIS OF THIS AFFIDIVAT IS – AND THE CONNECTION THAT THE POLICE MAKE WITH THE STOLEN VEHICLE TO DEFENDANT CUSKEY'S PROPERTY ARE TIRE TRACKS. AS YOU OBSERVED, THIS ALLEYWAY, CHARACTERIZED AS A DRIVEWAY BY THE DETECTIVES, IS TWO TO 300 FEET, AND ACCORDING TO SPITULSKI 200 TO 300 YARDS LONG. IT IS A VERY LONG ROADWAY, WHATEVER.

AND I THINK WHEN THE DETECTIVE INCLUDED IN HIS AFFIDAVIT, DRIVEWAY, THE MENTAL IMAGE [103] THAT THIS MAGISTRATE FORMED – AND IT'S VERY EASY TO DO. WHEN YOU THINK IT'S A DRIVEWAY, YOU THINK OF WHAT'S IN FRONT OF A FOUR-BEDROOM HOUSE, A STRIP OF CONCRETE, OR, IN NICER AREAS MAYBE A CURVING STRIP. BUT THIS IS NOT 40 OR 50 FEET LONG. THIS

IS 200, 300, TWO TO 300 YARDS LONG. WE DON'T KNOW THE EXACT LENGTH.

THE COURT: WELL, I WANT TO CORRECT ONE THING. YOU ARE SAYING THE IMPRESSION ONE WOULD HAVE IN READING THIS AFFIDAVIT. THIS COURT WAS DUTY-BOUND TO READ THE AFFIDAVIT. AND THAT'S CERTAINLY NOT THE IMPRESSION THIS COURT GOT FROM READING THE AFFIDAVIT.

MR. ESCOBEDO: WELL, OKAY.

THE COURT: THE AFFIDAVIT PRETTY – IT – IT – I WAS ABLE TO GET A PRETTY GOOD VISUAL OF WHAT HE WAS ATTEMPTING TO DESCRIBE BY READING THE AFFIDAVIT. AND I – AND THIS COURT GOT THE IMPRESSION THAT WAS A ROADWAY THAT TERMINATED IN FRONT OF SOME GATES. AND THEN ON THE OTHER SIDE OF THE GATES, THERE WAS SOME MATERIAL THAT LOOKED LIKE IT MAY HAVE BEEN RAKED.

MR. ESCOBEDO: WHAT THE OFFICER FAILED TO NOTIFY THE COURT, ISSUING MAGISTRATE, WAS THERE WERE EIGHT TO NINE RESIDENTS WHO HAD ACCESS TO THIS ROADWAY AS THEIR FRONT ACCESS.

THE COURT: RIGHT.

MR. ESCOBEDO: WHO USE THAT ROAD AS A [104] MEANS TO GET TO AND FROM THEIR HOUSE WITH AUTOMOBILES. THAT MEANS EIGHT, NINE, TEN CARS, PASSENGER VEHICLES PASS ON THAT ROAD EVERY DAY, PROBABLY TWICE A DAY BECAUSE THEY ARE COMING HOME. THERE IS NO

MENTI... THAT. ALL – ALL THERE IS IN THE AFFIDAVIT IS A ROADWAY. OKAY?

THE COURT: CORRECT.

MR. ESCOBEDO: SECOND OF ALL, THAT THE – THE AFFIDAVIT FAILS TO MENTION THE NATURE OF THE ROADWAY AND – AND HOW THEY ARE ABLE TO FOLLOW THESE TIRE TRACKS. AND I SPECIFICALLY SAY TIRE TRACKS BECAUSE THAT IS MENTIONED IN THE AFFIDAVIT NO LESS THAN ONE, TWO, THREE, FOUR, FIVE TIMES, TIRE TRACKS. THEY WERE ABLE TO FOLLOW TIRE TRACKS THIS 200, 300 FEET. OKAY. DESPITE THE FACT THAT EIGHT TO NINE PEOPLE, THE RESIDENTS USE THAT ROAD EVERY DAY.

THE COURT: WELL, THAT WOULD MAKE THE AFFIDAVIT EVEN MORE PERSUASIVE BECAUSE IN THE AFFIDAVIT, IT SAYS THAT THE – THEY REFERRED TO TIRE TRACKS IN A GENERAL SENSE EARLIER IN THE READING, BUT THEN HE WAS MORE SPECIFIC AND HE SAYS THAT THE TIRE TRACKS APPEARED TO MATCH THE TREAD PATTERN OF THE TIRE CURRENTLY MOUNTED ON THE TRUCK, WHICH –

MR. ESCOBEDO: RIGHT.

THE COURT: – WHICH LEAD UP TO THE GATE AND THAT SOFTER AREA THAT THE COURT SAW IN THE VIDEO. THOSE TIRE – THERE WERE TIRE IMPRESSIONS THROUGHOUT THERE THE COURT COULD SEE QUITE CLEARLY.

[105] YOU WANT TO TURN THAT BACK ON? YOU WANT TO LET THE COURT SEE THAT AGAIN?

MR. ESCOBEDO: SURE. YES.

THE COURT: AND FOR SOME REASON, THE PERSON WHO WAS PREPARING THAT TAPE DIDN'T HIGHLIGHT THAT, BUT THE COURT CERTAINLY SAW IT.

MR. ESCOBEDO: JUST IN ONE SHOT, YOU SEE ONE, TWO, THREE, FOUR, FIVE, SIX VEHICLES, YOUR HONOR –

THE COURT: RIGHT.

MR. ESCOBEDO: – WHO USE THAT ROAD.

THE COURT: RIGHT.

PRESUMABLY, ALL OF THEM MAKING THE TREAD IMPRESSIONS ON THE SOFTER PORTION OF THE DRIVEWAY.

MR. ESCOBEDO: AND HERE – HERE IS THE BEGINNING. AND IT'S MOSTLY ASPHALT.

THE COURT: RIGHT.

MR. ESCOBEDO: AND THEN IT'S BROKEN UP ASPHALT, AND YOU DON'T SEE ANY TIRE TRACKS THERE.

YOU WANT TO REWIND IT THERE?

THE COURT: NO, NO. JUST LET IT PLAY.

MR. ESCOBEDO: OR SEE –

(PAUSE)

MR. ESCOBEDO: SEE, YOU WOULD LOSE THE TRAIL RIGHT THERE. THERE WOULD BE NO TRAIL.

[106] MS. NAJERA: THERE IS THE TRACKS.

MR. ESCOBEDO: LATER ON.

THE COURT: CORRECT.

AND THAT'S WHY IT MAKES IT EVEN MORE PERSUASIVE BECAUSE IN THE COMMON AREA, YOU CAN'T DISTINGUISH IT. BUT AS YOU MOVE CLOSER –

MR. ESCOBEDO: YOU CAN SEE DOZENS –

THE COURT: – CLOSER TO THE DEFENDANT'S PROPERTY, CLEARLY, YOU CAN SEE TIRE TRACKS WHERE – YOU SEE TREAD IMPRESSIONS.

MR. ESCOBEDO: HOW ARE YOU GOING TO DISTIN[G]UISH THIS FROM THE OTHER RESIDENTS?

THE COURT: THOSE GOING DIRECTLY TO THE GATE AND THOSE THAT MATCH THE IMPRESSIONS ON THE TRUCK TIRE.

MR. ESCOBEDO: THAT'S ASPHALT THERE. WHERE IS THE GOUGE? IF THE GOUGE IS MADE ON THE STREET, IT'S GOING TO BE MADE ON THE ROADWAY.

THE COURT: THERE IS TIRE IMPRESSIONS THERE.

MR. ESCOBEDO: GOING TO THIS LOCATION?

THE COURT: RIGHT.

AND THE CAMERA PERSON DOES NOT WANT TO STAY ON THOSE FOR SOME REASON.

MR. ESCOBEDO: WELL, WE'LL REWIND IT AND PAUSE IT.

THE COURT: AND – AND THE COURT NOTICED THERE IS A COUPLE OF OCCASIONS WHERE THE CAMERA PERSON PANS AWAY FROM THESE TIRE TRACKS.

[107] (PAUSE.)

THE COURT: AND, AGAIN, THERE ARE MORE LEADING TOWARDS THE PROPERTY.

MR. ESCOBEDO: YOUR HONOR –

THE COURT: LET'S JUST –

MR. ESCOBEDO: OKAY.

THE COURT: – LET IT PLAY FOR A LITTLE WHILE.

(PAUSE.)

THE COURT: THIS IS THE SUBJECT PROPERTY; IS THAT CORRECT?

MR. ESCOBEDO: RIGHT.

AND I PAUSE RIGHT THERE BECAUSE I FEEL THAT'S ANOTHER MATERIAL OMISSION THAT THE AFFIDAVIT LEFT OFF. HE SHOULD HAVE INFORMED THE MAGISTRATE THAT THIS WAS NOT AN EMPTY LOT WITH NEWLY RAKED DIRT. IT WAS A LOT

FILLED WITH DOZENS AND DOZENS OF WHEELS, TIRES, AUTO PARTS. IT WAS A JUNK YARD.

THE COURT: THAT'S THE IMPRESSION THIS COURT GOT IN READING THIS AFFIDAVIT. IT DIDN'T APPEAR TO BE – IT SEEMED TO BE SOME KIND OF A SALVAGE LOT OR SOMETHING LIKE THAT.

MR. ESCOBEDO: IT'S A MISPRESENTATION.

[108] THE COURT: THAT'S THE IMPRESSION THIS COURT GOT READING THIS AFFIDAVIT.

MR. ESCOBEDO: I'M SORRY? WHAT?

THE COURT: SOME KIND OF A SALVAGE LOT, PERHAPS.

MR. ESCOBEDO: YOU WERE ABLE TO – THE ONLY DESCRIPTION THEY HAVE IN THE AFFIDAVIT, YOUR HONOR, IS FOUR – OR THREE WHEELS, SPOKE – WHITE SPOKE WHEELS THAT THEY OBSERVE AND A TRUCK LINER.

THE COURT: I SUPPOSE WHEN YOU THINK OF PEOPLE HAVING OIL TRACKS AND TRANSMISSION OIL FROM VEHICLES AND TIRE TRACKS GOING OUT AND TIRES STACKED ON ANOTHER SIDE OF A FENCE THAT MATCH – AND A BEDLINER AND THINGS LIKE THAT, YOU KIND OF GET THE IMPRESSION THIS IS NOT THE AVERAGE YARD.

MR. ESCOBEDO: WELL, YOUR HONOR, THERE IS NO EVIDENCE, TESTIMONY GIVEN REGARDING OIL TRACKS OR TRANSMISSION FLUID LEADING FROM THE VEHICLE TO THE PROPERTY,

NONE WHATSOEVER. THE PEOPLE RELIED ONLY UPON TRACKS. AND THEN LATER TODAY, WE FIND OUT HERE ABOUT THIS TIRE GOUGES AND INDENTATIONS.

THE COURT: AND, AGAIN, THE OTHER THING THAT GAVE THIS COURT THE IMPRESSION MAYBE THIS WAS KIND OF – SOME KIND OF A SALVAGE AREA, THERE WAS A FRESHLY RAKED AREA, THERE WERE TIRE TRACKS GOING IN, THERE WERE TIRES STACKED ON THE OTHER SIDE, THERE WAS A LINER ON THE OTHER SIDE, SOMEONE ATTEMPTING TO DISGUISE FRESH TRACKS, SOMETHING SUCH [109] AS ENGINE OIL, TRANSMISSION OIL, RADIATOR COOLER INSIDE THE PROPERTY. WHITE SPOKE TIRES APPEARED TO MATCH THOSE ON THE TRUCK. ORANGE TARP COVERING SOMETHING WHICH MIGHT HAVE BEEN AN ENGINE.

MR. ESCOBEDO: IT WAS TRASH, GARBAGE.

THEY SERVED THE WARRANT THE NEXT DAY, YOUR HONOR.

THE COURT: THE COURT IS INDICATING WHY IN READING THIS IT GOT THE IMPRESSION MAYBE THIS WAS SOME KIND OF A SALVAGE RESIDENCE YARD OR SOMETHING.

MR. ESCOBEDO: IT WASN'T MADE SPECIFICALLY CLEAR THAT THERE WERE NOT ONLY THESE THREE ALLEGED – OR SUSPECT WHEELS AND TIRES BUT DOZEN OF WHEELS.

I MEAN, YOU COULD – YOUR HONOR, YOU COULD GO IN AND PICK OUT ANY TYPE OF VEHICLE AND SAY, OH, THERE IS A STOLEN AUTO PART

FROM THIS VEHICLE BECAUSE IT'S A JUNK YARD, AUTO JUNK YARD.

THE COURT: WELL, WITH ALL THE WHEELS AND THEN THREE SPECIFICALLY THAT MATCH THE ONES ON THE TRUCK, THAT'S PRETTY PERSUASIVE, I THINK.

MR. ESCOBEDO: IF IT WAS TRUE. BUT THAT WASN'T THE CASE, YOUR HONOR.

THE COURT: YOU ARE SAYING IT DOESN'T MATCH. THE WHEELS DON'T MATCH?

MR. ESCOBEDO: THEY DON'T. THERE IS NO EVIDENCE. THEY SEIZE – YOUR HONOR, THEY SEIZE THREE WHEELS. I MEAN FOUR. EXCUSE ME. THEY SEIZE FOUR WHEELS, A SET OF 4 TIRES WHICH DON'T – DON'T BELONG [110] TO THE STOLEN VEHICLE. THEY WERE LOOKING FOR WHITE SPOKE WHEELS. THOSE WEREN'T FOUND. THEY LEAVE – THEY GIVE AN IMPRESSION, OH, WE FOUND THE STOLEN TIRES, BUT THEY DIDN'T.

THE TRUCK LINER, YOUR HONOR, DID NOT BELONG TO THE VICTIM IN THIS CASE.

THEY WERE ON A – JUST A FISHING EXPEDITION. THEY WERE LOOKING FOR – THEY WANTED TO GET IN THAT PROPERTY. THEY FOUND THE STOLEN VEHICLE AND THEY SAID, OKAY, HOW CAN WE CONNECT IT TO CUSKEY. WE'RE GOING TO MAKE UP A STORY ABOUT TIRE TRACKS. TIRE TRACKS. AND THEN HERE WE FIND OUT TODAY SIMPKINS TESTIFYING INDENTATIONS.

"SIMPKINS, DID YOU TELL DETECTIVE WALL ABOUT THE INDENTATIONS? YOU POINT IT OUT TO HIM?"

"YES."

"DID DETECTIVE WALL SEE IT?

DID BE INCLUDE, AN OFFICER OF 14 YEARS, DID HE INCLUDE IT IN HIS AFFIDAVIT?"

"N0."

GOUGES ARE PERMANENT. THEY WOULD STILL BE OUT ON THAT ASPHALT ROAD IF THEY WERE THERE. AND HE WOULD HAVE INCLUDED THAT.

TIRE TRACKS COME AND GO.

THIS OFFICER WOULD HAVE OBSERVED THAT, SAID I GOT CONCRETE, LITERALLY CONCRETE EVIDENCE AGAINST CUSKEY, LEADING –

[111] THE COURT: BUT WHERE?

MR. ESCOBEDO: ON THE ROADWAY.

THE COURT: ONE MOMENT.

YOU CAN'T JUST BE SO IMPRECISE. INDICATE WHERE YOU ARE TALKING ABOUT.

MR. ESCOBEDO: THE ROADWAY, YOUR HONOR. THE STREET, THIRD STREET.

SIMPKINS CLAIMED THAT THE TIRE WAS DEFLATED AND THAT THE RIM, IF YOU CAN BELIEVE THIS, THAT THE RIM CAUSED THE GOUGES.

THE COURT: HE DIDN'T SAY THAT.

MR. ESCOBEDO: HOW CAN RUBBER FROM THE TIRE CAUSE GOUGES OVER ASPHALT?

THE COURT: DEPUTY SIMPKINS DID NOT COME TO THIS COURT AND SAY THAT THE RIM CAUSED GOUGES. HIS TESTIMONY WAS THAT IT SCRATCHED THE SURFACE OUT THERE ON THIRD STREET.

MR. ESCOBEDO: WHAT SCRATCHED THE SURFACE, YOUR HONOR?

THE COURT: THE RIM.

MR. ESCOBEDO: THE RIM.

THE COURT: RIGHT.

MR. ESCOBEDO: THE RIM.

THE TIRE WAS ON A RIM.

THE COURT: WELL, FLAT TIRE, AND THE RIM CAN COME IN CONTACT WITH –

MR. ESCOBEDO: NO, YOUR HONOR. THERE WOULD BE –

[112] THE COURT: -- SURFACES. YOU SEE IT ALL THE TIME.

MR. ESCOBEDO: YOU WOULD HAVE ASPHALT, RUBBER FROM THE WHEEL – I MEAN RUBBER FROM THE TIRE AND THEN THE WHEEL. ADDITIONALLY, THERE WOULD BE – THE RIM WOULD HAVE TO BE EXPOSED ALL THE WAY AROUND IN ORDER TO MAKE A CONTINUOUS GOUGE.

THE COURT: THERE IS NO TESTIMONY THERE IS CONTINUOUS GOUGE.

MR. ESCOBEDO: SIMPKINS TESTIF[I]ED THAT HE FOLLOWED THE GOUGE LINE FROM THE STOLEN VEHICLE BACK TO CUSKEY'S ROADWAY.

THE COURT: WELL, THERE IS NO REQUIREMENT THAT THERE BE AN UNBROKEN, CONTINOUS GOUGE ANYWHERE.

MR. ESCOBEDO: I AGREE.

THE COURT: JUST SUFFICIENT EVIDENCE OF THE VEHICLE'S PATH TO GO FROM ONE POINT TO ANOTHER.

MR. ESCOBEDO: I AGREE.

BUT SIMPKINS TESTIFIED THAT THERE WAS A CONTINUOUS GOUGE LINE.

THE COURT: NO, HE DIDN'T.

MR. ESCOBEDO: HE FOLLOWED IT.

THE COURT: HE – THERE IS NO TESTIMONY IN THIS RECORD THAT HE SAID THERE WAS A CONTINUOUS GOUGE FROM THE PROPERTY TO WHERE THE VEHICLE WAS LOCATED.

MR. ESCOBEDO: YOUR HONOR, THE – THE WHOLE NOTION OF THIS DEFLATED TIRE IS COMPLETELY NEW TO ME, YOUR HONOR. YOU LOOK ON PAGE 6 OF THE AFFIDAVIT, [113] DEPUTY WALL DESCRIBES THE NATURE OF THE THREE – OF THE FOUR WHEELS. HE – NO WHERE –

THE COURT: WHAT LINE WOULD YOU LIKE TO GO TO?

MR. ESCOBEDO: 7 THROUGH 12.

THE COURT: ALL RIGHT.

MR. ESCOBEDO: WHERE DOES HE INDICATE, A VERY MATERIAL FACT, BEING THAT THE LEFT FRONT TIRE IS DEFLATED AND THE RIM SOMEHOW IS CAUSING THESE MARKS? NOWHERE IN THERE.

HE INDICATES THAT THE TIRES – IT APPEARS THAT THEY ARE FULLY INFLATED AND THE VEHICLE WAS ROLLED OUT TO THIS LOCATION, SUPPOSEDLY. AND, AGAIN, I ASK, WOULD AN OFFICER OF 14 YEARS PLUS EXPERIENCE NOT INCLUDE THAT MATERIAL OBSERVATION? THE TIRE WAS NOT DEFLATED.

THE COURT: FIRST OF ALL, YOU HAVE GOT THE DEPUTY RELATING SOMETHING TO THE PERSON WHO IS PREPARING AN AFFIDAVIT. RIGHT?

MR. ESCOBEDO: RIGHT.

THE COURT: AND YOU ARE SAYING THAT THAT'S A MATERIAL OMISSION TO SAY ONE OF THE TIRES – TO FAIL TO SAY ONE OF THE TIRES WAS FLAT?

MR. ESCOBEDO: SURE, BECAUSE THAT PARTICULAR WHEEL WAS THE ONE THAT CAUSED THE TRACK.

THE COURT: OKAY.

AND YOU ARE ALSO SAYING THAT –

[114] MR. ESCOBEDO: I'M SAYING DETECTIVE WALL DID NOT INCLUDE THAT IN HIS AFFIDAVIT.

THE COURT: HOW ABOUT ON PAGE 7, LINE 13, "THE DEPUTIES OBSERVED THREE WHITE SPOKE TYPE WHEELS AND TIRES WHICH APPEARED TO MATCH THE WHEEL AND TIRE MOUNTED ON THE LEFT FRONT OF THE PICKUP TRUCK"? YOU ARE SAYING THIS IS UNTRUE?

MR. ESCOBEDO: NO, I DIDN'T SAY THAT WAS UNTRUE. THEY OBSERVED THREE WHITE SPOKE TYPE WHEELS ALONG WITH HUNDREDS OF WHEELS.

THE COURT: EARLIER IN YOUR COMMENT, YOU INDICATED THAT ISN'T TRUE.

MR. ESCOBEDO: NO, I – NO, NO, I DIDN'T SAY THAT, YOUR HONOR.

I'M SAYING WHAT WAS UNTRUE WAS THE FACT THAT THEY DID NOT INCLUDE THAT THERE WERE HUNDREDS OF OTHER WHEELS LOCATED IN THE BACK. THERE WAS THE THREE THAT THEY ALLEGE CAME OFF THE STOLEN VEHICLE, BUT THERE WAS ALSO MANY, MANY MORE. THOSE WHEELS WERE NEVER RECOVERED WHEN THEY EXECUTED THE SEARCH WARRANT.

THE COURT: WHICH WHEELS WEREN'T RECOVERED?

MR. ESCOBEDO: THE ONES THAT WAS ALLEGEDLY OBSERVED ON THE OTHER SIDE OF THE FENCE ON AUGUST 3RD.

THE COURT: RIGHT.

BUT YOU ARE NOT SAYING THAT THOSE [115] WHEELS WEREN'T THERE?

MR. ESCOBEDO: I DON'T KNOW WHAT HAPPENED OR WHATEVER. THEY WEREN'T SEIZED. BUT THE FACT THAT THERE WAS HUNDREDS MORE THERE I THINK WAS VERY IMPORTANT.

THE COURT: OKAY.

MR. ESCOBEDO: OH, IN THE AFFIDAVIT, WALL INDICATED THAT THE DEPUTIES WERE ABLE TO FOLLOW THE TIRE TREAD MARKS. OKAY? TIRE TREAD MARKS.

THE COURT: YOU WANT TO DRAW THE COURT'S ATTENTION TO A CERTAIN LINE AND PAGE?

MR. ESCOBEDO: YES, I WILL.

ONE MOMENT, PLEASE, YOUR HONOR.

(PAUSE.)

MR. ESCOBEDO: OKAY. HERE WE GO. PAGE 6, LINE – STARTING ON LINE 23, "THEY SAW TIRE TRACKS LEADING BACK TO A FENCE AT THE END OF A LONG DRIVEWAY THAT RAN EASTBOUND FROM THE STREET. THESE TIRE TRACKS APPEARED TO MATCH THE TREAD PATTERN OF THE TIRE CURRENTLY MOUNTED ON THE TRUCK."

THE COURT: ALL RIGHT.

MR. ESCOBEDO: NOW, WE HAVE GOT ONE TIRE, YOUR HONOR, THAT'S SUPPOSEDLY CREATING THIS INDENTATION, GOUGE. THERE IS NO TIRE TRACK THERE. THAT WOULD HAVE BEEN – THAT WOULD HAVE BEEN IN THAT PARAGRAPH.

[116] "WE OBSERVED A GOUGE, INDENTATION THAT LEAD FROM THE GATE ALL THE WAY TO WHERE THE TRUCK WAS ORIGINALLY FOUND."

THE COURT: IT DOESN'T EXACTLY SAY THAT. I THINK YOU ARE READING A LITTLE TOO MUCH IN THAT.

THIS AFFIDAVIT IS SAYING THERE ARE SOME TIRE TREADS IMMEDIATELY BEFORE THE GATE TO SOME DISTANCE AWAY FROM THE GATE. DOESN'T SAY THAT, NECESSARILY.

YOU ARE ASSUMING THEY MUST HAVE BEEN ALL THE WAY TO WHERE THE TRUCK WAS LOCATED.

MR. ESCOBEDO: IF IT WAS DEFLATED, IT WOULD HAVE LEFT A LARGE GOUGED INDENTATION THE ENTIRE WAY UNLESS YOU – ULTIMATELY, SOMEHOW, THE TIRE INFLATED ON THE WAY AND WENT FROM A TREAD PATTERN SUDDENLY DOWN TO INDENTATION, GOUGE. THAT DOESN'T MAKE SENSE.

THE COURT: I'M JUST NOT APPRECIATING THE DIFFICULTY THAT YOU ARE HAVING WITH THAT.

IF – IF – FIRST OF ALL, IT'S UNCLEAR AS TO WHICH TIRE WAS MAKING – THAT THEY ARE REFERRING TO WHEN THEY ARE REFERRING TO THE TRACKS IMMEDIATELY IN FRONT OF THE GATE LEAVING THE PROPERTY, WHETHER THAT'S THE FLATTENED TIRE ON THE FRONT LEFT OR THE OTHERS OR A COMBINATION OF ALL OF THEM.

AND THEN – BUT IT IS CLEAR TO THE COURT WHAT WAS MAKING THE IMPRESSION OR THE SCRATCH ON THE HARD ASPHALT IN THE STREET, ON THIRD STREET, [117] AND THAT WOULD HAVE BEEN THE ONE THAT HAD THE FLAT TIRE WHERE THE RIM AT SOME POINT IN TIME DURING ITS JOURNEY THERE, WHERE IT FINALLY RESTED, WAS SCRATCHING THE PAVEMENT. THAT DOESN'T IMPLY THERE HAS TO BE A CONTINUOUS TRAIL FROM POINT A TO POINT B.

MR. ESCOBEDO: BUT THE FACT THAT THE COURT IS MAKING A DETERMINATION BASED ON THAT TIRE GOUGE MAKING A MARK, WHETHER CONSISTENT OR INCONSISTENT, SHOWS YOU THAT IT'S MATERIAL. BUT IT'S NOT IN THE AFFIDAVIT. THERE IS NO MENTION OF THIS DEFLATED TIRE, THIS GOUGE, INDENTATION, RIM MAKING CONTACT WITH THE ASPHALT.

THE COURT: IT'S LIKE YOU HAVE TO DRAW SOME CONCLUSIONS OR, OTHERWISE, YOU ARE LITERALLY WRITING A BOOK, UNTIL YOU ARE – TO INCLUDE A GREAT DEAL OF INFORMATION.

HOW WOULD YOU SUMMARIZE THAT THEN IF – IF – A PORTION OF THE TRAIL LEADING FROM THE THE [sic] PROPERTY IS TIRE TREAD, THEN WHEN IT

GETS ON A HARDER SURFACE AND THE RIM IS COMING IN CONTACT WITH THE PAVEMENT, IT'S LEAVING A DIFFERENT TYPE OF IMPRESSION? HOW WOULD YOU CHARACTERIZE THAT?

MR. ESCOBEDO: WELL, I WOULD THINK – I WOULD THINK IT WOULD BE IMPORTANT TO NOTIFY THE MAGISTRATE OF THE – OF THE NATURE OF THE SURFACE THAT THIS TRACK IS GOING OVER AND THEN DESCRIBE HOW IT CHANGES BECAUSE –

THE COURT: WELL, DON'T YOU THINK MOST [118] PEOPLE WOULD SAY THEY WERE ABLE TO FOLLOW A TRACK FROM JUST, IN A BROAD SENSE, I WAS ABLE TO FOLLOW A TRAIL FROM WHERE – THAT CONSISTED OF TREAD IMPRESSIONS AT ONE POINT, CHANGED SURFACE AND THEN SCRATCHES ON ANOTHER PORTION AND IMPRESSIONS ON ANOTHER PORTION, DEPENDING ON THE HARD[NESS] OR SOFTNESS OF THE SURFACE FROM POINT A TO POINT B? WOULD YOU SAY WE WERE ABLE TO FOLLOW A TRACK FROM HERE TO THERE?

MR. ESCOBEDO: GIVEN THE PECULIAR CIRCUMSTANCES OF THIS CASE – WHEN I FIRST READ THE AFFIDAVIT, I THOUGHT IT WAS NO PROBLEM. THEN I WENT OUT TO THE LOCATION AND OBSERVED IT. YOU ARE LOOKING AT 300 FEET PLUS OVER DIRT, GRAVEL, BROKEN ASPHALT AND THEN PAVEMENT ON A CITY STREET. AND THEN I'M GOING – AND THEY FOLLOWED TIRE TRACKS, ACCORDING TO THE AFFIDAVIT. THIS IS BEFORE I EVEN LEARNED ABOUT THIS TIRE GOUGE, TIRE

INDENTATION. GOING OFF OF THE AFFIDAVIT, TIRE TRACKS, NO WAY.

THE COURT: WELL, THIS IS CLEAR WHERE IT SAYS THE TIRE TRACKS ARE LEAVING THE AREA IMMEDIATELY IN FRONT OF THAT GATE AWAY FROM THE GATE. I CAN SEE FROM THAT – THAT VIDEO THAT, CERTAINLY, VEHICLES ARE DOING IT.

MR. ESCOBEDO: RIGHT. MULTIPLE VEHICLES PASS ON – THAT MOVEMENT OF THE TRUCK WAS NOT THE ONLY TRANSVERSE OF THAT ROADWAY, YOUR HONOR.

THE COURT: WELL, WE HAVE MORE THAN THAT. [119] WE HAVE THE TIRE TREAD PATTERN LEAVING THE IMMEDIATE AREA OF THE GATE, GOING AWAY FROM IT, WHICH MATCHED THE TIRE TREAD PATTERN ON THE TRUCK.

MR. ESCOBEDO: IT'S – I DON'T – I GUESS THE COURT DID NOT APPRECIATE THE – THE NATURE OF THAT MATERIAL AND THE IMPROBABILITY OF, FIRST OF ALL, CREATING A TRACK THAT COULD BE FOLLOWED THAT LENGTH. AND I THINK MR. CEBALLOS WENT OUT THERE, HE OBSERVED THAT, AND THAT'S WHY MR. OJALA IS PRESENTLY OUT OF CUSTODY.

THE COURT: WELL, I SUPPOSE EIGHT OR NINE MONTHS LATER, YOU – ONE WHO WASN'T THERE AT THE TIME THE TRACK WAS MADE COULD SEE A LOT OF THINGS ABOUT IT. YOU DON'T SEE – MAYBE YOU DON'T SEE HOW IT COULD HAVE DONE IT, BUT THAT DOESN'T MEAN –

MR. ESCOBEDO: THE ROAD, I ASKED THE OFFICER, WAS THE ROAD IN SIMILAR CONDITION AS IT WAS ON THE DATE OF THE ARREST. AND HE SAID, YES. THERE HASN'T BEEN ANY DIGGING –

THE COURT: SO YOUR CONCLUSION IS SOMEONE TOWING OR PUSHING A VEHICLE AWAY FROM THE PROPERTY – OR LET'S TAKE IT AS ONE MIGHT REASONABLY CONCLUDE MIGHT HAPPEN. SOMEONE PUSHING OR TOWING A VEHICLE NOT OPERABLE AWAY FROM THE PREMISES AND IT HAS FOUR TIRES ON IT, ONE OF THEM BEING FLAT AND IMMEDIATELY – THE AREA IMMEDIATELY AS YOUR [sic] ARE LEAVING THE GATE TO THE PREMISES, SUBJECT PREMISES, IS SOFT WHERE CLEARLY ON THE VIDEO YOU WOULD LEAVE [120] TIRE IMPRESSIONS, THEN AS THE SURFACE BEGINS TO CHANGE TO HARDER SURFACES, YOU ARE SAYING THAT THE RIMS AREN'T SCRATCHING THAT AND THEN IT [sic] TURNING LEFT AND GOING DOWN SOUTHBOUND AND IT'S NOT MAKING ANY IMPRESSIONS ON THE ROADWAY?

MR. ESCOBEDO: WELL, YOU CAN MAKE A BIG ASSUMPTION. YOU ARE SAYING THE RIM WAS SCRATCHING IT.

THE COURT: WELL, THAT'S THE – THAT'S THE TESTIMONY BEFORE THIS COURT.

MR. ESCOBEDO: IN THE AFFIDAVIT WRITTEN AUGUST 4TH WHEN THE INFORMATION IS CLEAR IN HIS MIND –

THE COURT: IT'S JUST A SUGGESTION THE AFFIANT MAKES. AND HE SAYS, "DESCRIBE WHAT

YOU SAW." AND THEY SAY, "OKAY, I SAW TIRE TRACKS THAT LEAD FROM HERE TO – FROM POINT A TO POINT B AND, SPECIFICALLY, IN FRONT OF THE GATE ARE TIRE PATTERNS. THAT PORTION OF IT IS A TIRE TREAD PATTERN." HE – AND, CLEARLY, HE'S NOT TALKING ABOUT ALL OF IT AT THAT POINT. HE'S DISTINGUISHING BETWEEN WHAT WAS OBSERVED IMMEDIATELY IN FRONT OF THE GATE TO WHAT WAS MADE LATER ON DURING THE JOURNEY OF THE VEHICLE. HE'S MADE THAT DISTINCTION THERE. DON'T YOU THINK? LOOK AT THE – LOOK AT LINE 25.

MR. ESCOBEDO: WHAT PAGE, YOUR HONOR?

THE COURT: PAGE 5 – PAGE 6, STARTING AT [121] 23. "THE TRACKS, THE TIRE TRACKS LEADING BACK TO THE FENCE." AND THEN 25, "APPEARED TO MATCH THE TREAD PATTERN ON THE TIRES." HE'S TALKING ABOUT THAT ONE SPECIFIC SOFT AREA WHICH IS PRIMARILY – LOOKS LIKE DIRT, IS THE IMPRESSION THE COURT HAS FROM LOOKING AT THE VIDEO.

MR. ESCOBEDO: IF – IF THERE WERE NO RESIDENCES ON EITHER SIDE OF THAT ROADWAY, THIS CASE WOULD BE A LOT CLEARER. BUT WITH THE NUMBER OF VEHICLES TRAVELING ON THAT ROADWAY –

THE COURT: WELL, IT MAKES IT CLEAR TO THE COURT THAT THERE ARE OTHER VEHICLES ON THERE LEAVING TIRE PATTERNS AS WELL OF A DIFFERENT NATURE, A DIFFERENT –

MR. ESCOBEDO: WITH ALL THE VEHICLE TRAFFIC, HOW ARE YOU GOING TO DECIPHER THAT ONE VEHICLE GOING THAT WAYS UP?

THE COURT: BECAUSE ONE IS GOING STRAIGHT FROM THE TRUCK WITH THE TIRE TREAD MATCHING THE TRUCK. THOSE OTHERS DON'T MATCH THE TIRE TREAD ON THE TRUCK. AND YOU WOULDN'T EXPECT THEM TO. AND YOU CAN SEE WHERE THEY HAVE TURNED INTO OTHER DRIVEWAYS AND THEY ARE STILL THERE. THEY ARE THERE AT THE TIME THE VIDEO WAS TAKEN, SOME OTHER PATTERNS.

MR. ESCOBEDO: THEN – WELL, I'LL – YOU KNOW, THE DEAL ABOUT THE GOUGE ON THIRD STREET FROM THE ENTRANCE TO THE ROAD –

THE COURT: WELL, YOU HAVE TO UNDERSTAND [122] THERE IS NO EVIDENCE BEFORE THIS COURT THAT THERE ARE GOUGES ON THIRD STREET.

MR. ESCOBEDO: HOW ABOUT INDENTATIONS THEN?

THE COURT: THERE IS TESTIMONY DESCRIBED AS SCRATCHES BY DEPUTY SPITULSKI AND SOME INDENTATIONS BY DEPUTY SIMPKINS. INDENTATIONS.

MR. ESCOBEDO: INDENTATIONS.

THE COURT: INDENTATIONS WHAT HE SAID IN THE ASPHALT.

MR. ESCOBEDO: NOW, THEORETICALLY, THOSE MADE IN THE ASPHALT, THEY SHOULD STILL BE THERE.

THE COURT: AND THEN HE LATER AS HE WAS QUESTIONED, HE – HE USED THE WORD INDENTATION TO SCRATCH INTERCHANGEABLY.

MR. ESCOBEDO: THEY SHOULD BE THERE, RIGHT?

THE COURT: THE FIRST DEPUTY USED SCRATCHES COMPLETELY THROUGHOUT WHEN HE REFERRED TO WHAT HE SAW ON THIRD STREET ON THE ASPHALT, THE HARD SURFACE.

MR. ESCOBEDO: WELL, HERE IT IS MARCH 20, THE FIRST TIME WE HEAR ABOUT IT.

THEN SIMPKINS, WE ASK HIM, DID YOU TELL WALL? WALL, HE SAID, YES. AND HE ALSO SAID HE POINTED IT OUT TO HIS SUPERVISOR. I FORGOT HIS NAME, ANOTHER DEPUTY. THAT DEPUTY, WE HAVE NEVER HEARD OF HIS NAME, AND HERE IT IS THE FIRST TIME. AND, OF COURSE, THAT'S THE DETECTIVE WHO SUPPOSEDLY SAW THESE [123] GOUGES. WE NEVER HEARD ABOUT THAT. IT WAS NEVER IN THE POLICE REPORT OR NEVER IN THE AFFIDAVIT.

IF SOMEONE WAS GOING TO BE NOTIFIED, IT WOULD HAVE BEEN DETECTIVE WALL BECAUSE IT WAS HIS DUTY TO PREPARE THAT AFFIDAVIT. IT WAS HIS DUTY TO GATHER ALL THE RELEVANT, IMPORTANT EVIDENCE.

THE COURT: AND HE'S GOT TO MAKE A PERSONAL OBSERVATION? ALL THOSE PEOPLE ARE SUPPLYING HIM WITH THE INFORMATION.

MR. ESCOBEDO: HE WAS THERE. HE WAS PERSONALLY ADVISED.

THE COURT: THE COURT IS SATISFIED WITH THE REASON HE GAVE FOR NOT GOING THERE TO PERSONALLY OBSERVE THESE DEPUTIES' OBSERVATION. WHY WOULD HE WANT TO GO DOWN THERE, CREATE MORE ATTENTION TO HIMSELF?

MR. ESCOBEDO: I UNDERSTAND THAT.

HE CLAIMS HE WAS PERSONALLY ADVISED OF THE OBSERVATION. ALL SIMPKINS HAD TO DO, SAY, LOOK, THERE IS THE GOUGE, THERE IS THE INDENTATION. THERE IS THE SCRATCH. IT WAS NEVER DONE.

STRIKE THAT.

SIMPKINS DID TESTIFY THAT HE DID.

THE COURT: HE POINTED IT OUT TO SERGEANT WALL.

MR. ESCOBEDO: CORRECT. RIGHT.

AND SERGEANT WALL TESTIFIED, NO, I DIDN'T SEE ANY, BECAUSE IF HE DID SEE IT, YOUR HONOR, [124] HE WOULD HAVE INCLUDED IT IN THE AFFIDAVIT, NOT ONLY DO I HAVE TIRE TRACKS, MAGISTRATE FALLS, I GOT GOUGES. IF YOU GO OUT THERE, THEY ARE STILL OUT THERE.

THE COURT: THERE GOES THAT WORD, GOUGES.

MR. ESCOBEDO: INDENTATION.

THAT WAS HIS WORD LATER ON WITH DEPUTY D.A. CEBALLOS.

I MEAN WE COULD ALL DRIVE OUT THERE RIGHT NOW AND FIND THOSE SCRATCHES. THEY WOULD BE THERE.

THE COURT: I DON'T KNOW WHY WE WOULD EXPECT THEM TO BE THERE.

MR. ESCOBEDO: IT'S IN ASPHALT. IT'S NOT GOING TO BE WASHED AWAY, BRUSHED AWAY.

THE COURT: SUPERFICIAL SCRATCHES MADE BY TIRE RIMS, YOU SEE IT ALL THE TIME. THEY ARE THERE AND THEN NOT THERE.

MR. ESCOBEDO: I BEG TO DIFFER.

SIMPKINS TESTIFIED THAT THE RIM MADE THE MARK. HE TESTIFIED IT WAS DEFLATED.

"WAS THE RIM OUTSIDE OF THE WHEEL (SIC)?"

"NO."

THE WHEEL WAS NOT MAKING CONTACT WITH THE GROUND. IT WASN'T. I MEAN –

THE COURT: WE DON'T KNOW THAT.

MR. ESCOBEDO: WE CAN USE OUR COMMON SENSE.

[125] THE COURT: WELL, WE CAN SAY THAT IT WAS, BASED ON TESTIMONY, AT SOME POINT IN TIME IT WAS MADE ON THE GROUND.

MR. ESCOBEDO: RIGHT. PHYSICALLY IMPOSSIBLE.

THE COURT: HOW MANY TIMES HAVE YOU SEEN A DEFLATED TIRE? IF YOU TAKE THE VEHICLE OUT OF MOTION IMMEDIATELY, THEN, FINE. BUT IF YOU CONTINUE ROLLING A DEFLATED TIRE, EVENTUALLY, THAT STARTS TO – THE RIM CONTACTS WITH PAVEMENT.

MR. ESCOBEDO: I SEE THAT ON POLICE GETAWAY CHASES, THE CAR IS TRAVELING AT HIGH SPEED, THE WHEEL, WHAT HAPPENS, THE TIRE IS LITERALLY FLUNG OFF THE WHEEL BECAUSE OF THE SPEED OR THE FACT IT IS PUNCTURED. THIS IS BEING PUSHED. IT WASN'T BEING DRIVEN AT A HIGH RATE OF SPEED. IT'S BEING PUSHED. NO WAY COULD THE FORCES OF GRAVITY, WHATEVER CENTRIFUGAL FORCE, CAUSE THAT TIRE TO BREAK UP. AND IF IT DID BREAK UP, THAT WOULD BE OBSERVED.

THE COURT: WHY DO YOU BELIEVE IT HAS TO BREAK UP LIKE ON A HIGH SPEED? YOU CAN SEE A TIRE COMING OFF, THE RIM COMING IN CONTACT JUST BY MOVING IT A LONG DISTANCE.

MR. ESCOBEDO: IT WAS DEFLATED.

THE COURT: IF IT IS FLAT. IF THERE IS SOME AIR HOLDING THE TIRE AGAINST THE SIDE OF THE RIM, IT'S LIKELY TO BE TRUE. BUT IF WE'RE TALKING ABOUT A FLAT TIRE, THAT RIM

COULD CERTAINLY [126] COME IN CONTACT WITH THE PAVEMENT.

MR. ESCOBEDO: I DON'T THINK THERE WAS TESTIMONY IT WAS. NO ONE SAID IT WAS SITTING ON THE GROUND. THEY SAID IT WAS DEFLATED.

THE COURT: WELL, YEAH, ONE DEPUTY DID.

YOU ARE ASKING THE COURT TO FIND THAT THIS – THAT THERE WAS SUCH AN OMISSION – I MEAN IN TERMS OF TIRE TRACKS WAS SO DEFICIENT THAT IT MISLEAD THE MAGISTRATE.

MR. ESCOBEDO: THAT WAS ONE OF THE ISSUES, YOUR HONOR.

THEN I'M TALKING ABOUT 214, 241.

AND THEN I'M TALKING ABOUT THE DESCRIPTION OF THE ROADWAY, THE DESCRIPTION OF THE DRIVEWAY AND THE FACT THIS WAS A – LITERALLY AN AUTOMOTIVE JUNK YARD ON THE OTHER SIDE OF THE FENCE, AND THAT INFORMATION WAS NEVER SUPPLIED TO MAGISTRATE FALLS.

THE COURT: IF ONE WERE TO VIEW THIS AFFIDAVIT NOT AS A – AS AN ADVOCATE BUT JUST A MAGISTRATE, NEUTRAL PARTY, ONE WOULD LEAD TO THE CONCLUSION THAT THERE IS SOMETHING ELSE ON THE OTHER SIDE OF THE GATE OR THAT THIS TRUCK CAME IN THERE, SOMETHING.

MR. ESCOBEDO: YEAH, BUT IF YOU ACTUALLY WENT OUT TO THE LOCATION AND SEE EVERYTHING GOING OUT THERE, THIS IS JUST BARE BONE, SKELETON.

THE COURT: YOU'RE ASKING THIS COURT TO [127] STRIKE SOMETHING FROM HERE AND REREAD IT AND SEE IF I COULD COME TO THE SAME CONCLUSION OR ADD SOMETHING TO IT AND REREAD IT AND WONDER IF THE COURT WOULD COME TO THE SAME CONCLUSION.

MR. ESCOBEDO: IF THE COURT WAS SUPPLIED WITH ADDITIONAL INFORMATION.

THE COURT: WHAT IS THAT ADDITIONAL INFORMATION THAT YOU WOULD LIKE FOR THIS COURT TO READ IN CONJUNCTION WITH WHAT'S HERE?

MR. ESCOBEDO: THE ACTUAL LENGTH OF THE ROADWAY, THE NATURE OF THE MATERIAL SURFACE.

THE COURT: SOME OF IT IS SOFT AND SOME HARD.

MR. ESCOBEDO: AND THAT THE NUMBER OF PEOPLE WHO USE IT AND WHAT WAS OBSERVED ON THE OTHER SIDE OF THE FENCE, HUNDREDS OF WHEELS AND TIRES, AUTO PARTS, AND WHERE ACTUALLY THE VEHICLE WAS LOCATED AT 241, NOT 214.

THE COURT: ALL RIGHT.

MR. ESCOBEDO: AND THE NATURE OF THE WHEELS. THE ACTUAL – ALL WE HAVE IS FOUR WHEELS WERE FOUND ON THE TRUCK, NO DESCRIPTION ABOUT PARTIALLY DEFLATED. WE DON'T HAVE THAT.

THE COURT: OKAY.

MR. ESCOBEDO: AND GIVEN – IF YOU – IF – IF THE MAGISTRATE KNEW OF ALL THESE THINGS, HE WOULD HAVE SAID, "HOW IS THIS TIRE TRACK FOLLOWED? HOW IS IT MADE? AND SHOW ME WHAT – HOW IT IS MARKED UP THE [128] ROADWAY, GRAVEL, DIRT, WHATEVER. AND DO OTHER ROADS – CARS PASS BY THAT ROADWAY?"

"YES."

"HOW MANY?"

"TEN."

"WELL, HOW ARE YOU GOING TO CONCLUDE THAT? HOW DO YOU KNOW THAT THOSE ARE THE WHEELS?"

I MEAN, YOU ARE LOOKING AT HUNDREDS OF WHEELS. I MEAN, YOU COULD GET ANY STOLEN CAR IN L.A. COUNTY, GO TO THAT PROPERTY AND GET A SEARCH WARRANT BECAUSE YOU OBSERVED STOLEN PARTS, POTENTIALLY, STOLEN PARTS FROM THAT PARTICULAR VEHICLE.

THE COURT: OKAY.

MR. POPE.

MR. ESCOBEDO: I'LL DEFER TO MR. POPE HERE.

THE COURT: ALL RIGHT.

MR. POPE: YOUR HONOR, IT'S OUR POSITION WHAT THIS WAS, WAS AN EFFORT ON THE PART OF THAT LITTLE TOWN OF BASSET THERE

APPARENTLY DOESN'T LIKE MR. CUSKEY AND WHAT HAS BEEN CHARACTERIZED AS HIS JUNK YARD.

THE COURT: THE, TOWN DOESN'T LIKE THE DEFENDANT?

MR. POPE: WELL, I THINK –

THE COURT: IS THAT BEFORE THE COURT?

MR. POPE: NO, NO. I'M JUST KIND OF FILLING IN A LITTLE COLOR FOR YOUR HONOR.

[129] WELL, I MEAN THE FACT OF THE MATTER IS ONE OF THE OFFICERS TESTIFIED THAT HE HAS – HE HAS SPOKEN WITH CUSKEY A COUPLE OF TIMES. HE HAS TALKED TO HIM ON THE PHONE, I BELIEVE, FOUR TIMES. IT HAS BEEN GOING ON FOR A COUPLE OF YEARS, THIS CODE ENFORCEMENT TEAM AND WHAT THEY ARE DOING AT THE PROPERTY. AND I THINK THAT THE COURT CAN CONSIDER THAT IN EVALUATING CREDIBILITY.

AND WHAT IT'S GOING TO COME DOWN TO IS THE TIRE TRACKS. DETECTIVE WALL DIDN'T SEE TIRE TRACKS. DETECTIVE WALL DIDN'T SEE GOUGES. DETECTIVE WALL RELIED ON SPITULSKI AND SIMPKINS. SIMPKINS HAS A GRUDGE AGAINST CUSKEY. WITH THAT IN MIND, HE PRESENTED THE AFFIDAVIT AS BEST HE COULD.

NOW, WE LOOK AT THE TESTIMONY OF – IT WAS EITHER SIMPKINS OR SPITULSKI. AND, SURELY, THEY HAVE SPOKEN WITH THE DISTRICT ATTORNEY. SURELY, THEY HAVE SPOKEN WITH DETECTIVE WALL. AND THEY ARE AWARE THAT THIS

WORD, GOUGE, WAS DETECTIVE WALL'S CHOICE OF WORDS WHEN HE WAS SPOKE – WHEN HE WAS SPEAKING WITH THE DEPUTY DISTRICT ATTORNEY. THAT WAS THE TESTIMONY THAT THE COURT HAS.

THE COURT: ARE, WE TALKING ABOUT – NOW, HERE'S THE PROBLEM I HAVE WITH THAT, MR. POPE.

IF WE'RE TALKING ABOUT A TIRE BEING PUSHED AWAY FROM THE PREMISES AND IT'S LEAVING SOME TIRE TREAD IMPRESSIONS IN A SOFT AREA IMMEDIATELY AFTER THE GATE AND THEN AT SOME OTHER PORTION A FLAT [130] TIRE IS NOW LEAVING – A COMBINATION, FLAT TIRE AND POSSIBLY RIM COMING IN CONTACT WITH SOFT AND HARD SURFACES, I WOULD SUSPECT THAT IT'S GOUGING THAT SURFACE ALL ALONG THE WAY. AND IT WASN'T CLEAR TO THE COURT. WE WEREN'T TALKING ABOUT GOUGING OUT ON THIRD STREET, WE'RE TALKING ABOUT GOUGING ON THAT SURFACE ROAD.

MR. POPE: ALL RIGHT, YOUR HONOR. THEN – THEN – THEN, FINE.

MY – THE POINT I'M TRYING TO MAKE IS THIS COURT SHOULD REJECT THE STATEMENTS OFFERED BY SPITULKI AND SIMPKINS.

THE COURT: SPITULKI?

MR. POPE: SPITULSKI AND SIMPKINS, BECAUSE NO. 1, THEY HAVE BEEN MODIFYING THEIR – THEIR STATEMENTS, WHETHER THEY BE IN THE FORM OF SOMETHING GIVEN IN THE REPORT TO THE DETECTIVE, WHETHER THEY BE

SOMETHING IN THE FORM OF TESTIMONY GIVEN TO THIS COURT. THEY HAVE BEEN CHANGING THEIR TESTIMONY TO ACCOMMODATE PROBLEMS IN THE WARRANT THAT HAVE BEEN PRESENTED TO THEM.

THE COURT: LET'S LOOK AT IT LIKE THIS. IF YOU ARE ONE OF THE OBSERVING WITNESSES, WHEN A DEPUTY IS OUT THERE AND YOU SEE SOME TIRE TRACKS, INDENTATIONS, GOUGES AND SCRATCHES ALL ALONG A LONG PERIOD OF THE ROADWAY AND YOU ARE GOING OVER TO RELATE THAT TO SOMEONE WHO IS GOING TO WRITE A REPORT, THAT REPORT WRITER IS PROBABLY GOING TO USE [131] A VERY OVERALL OR BROAD TERM TO DESCRIBE THAT. HE'S PROBABLY NOT GOING TO GO THROUGH THE DETAIL AND SAY, WELL, I SAW THE TIRE IMPRESSIONS HERE. AND, IN FACT, HE DID BREAK IT DOWN TO TIRE IMPRESSION IN THE SOFT AREA AND THEN TIRE TRACKS THE REST OF THE WAY. I MEAN THAT'S – DON'T YOU THINK THAT'S BROAD ENOUGH TO ENCOMPASS THAT DESCRIPTION HE SAW?

MR. POPE: YOUR HONOR, I DO NOT HAVE ANY PROBLEM WHATSOEVER WITH THE WARRANT ON ITS FACE. THE QUESTION IS WHETHER OR NOT THAT INFORMATION THAT WAS PUT IN THE WARRANT IS TRUE. THE ONLY ISSUE IS WHETHER OR NOT SIMPKINS AND SPITULSKI TOLD THE TRUTH TO DETECTIVE WALL. AND I WOULD SUGGEST TO YOU, NO. 1, THEY BOTH HAVE A MOTIVE TO –

THE COURT: I SEE.

MR. POPE: – LIE ABOUT MY CLIENT.

NO. 2, THEY INDICATED TO THE COURT THAT THEY SHOWED DETECTIVE WALL THE MARKS. THEY WERE VERY SPECIFIC ABOUT THAT. AND WHY? BECAUSE NOW WE'RE IN FRONT OF A COURT. WE HAVE TO FILL THESE GAPS IN. WALL TESTIFIED HE DIDN'T SEE THAT. THEY BOTH SAID THEY SHOWED HIM THE – THE – THE LAST OFFICER, THE ONE WHO WENT FROM THE INDENTATION TO THE – OR THE SCRATCH TO THE INDENTATION –

THE COURT: SIMPKINS.

MR. POPE: – SAID THAT HE DID, HE TRACED A WHOLE LINE BACK TO THE – THE – THE – THE STREET WITH NO NAME, THAT HE WENT ALONG THIRD STREET AND HE [132] POINTED THAT OUT TO DETECTIVE WALL. THAT WAS HIS TESTIMONY.

YOUR HONOR, THAT'S NOT CREDIBLE BECAUSE DETECTIVE WALL SAYS THAT DID NOT HAPPEN. NOW, WHAT DOES THAT MEAN? DOES THAT MEAN THAT THAT OFFICER'S CREDIBILITY SHOULD BE QUESTIONED? AND IN THIS DAY AND AGE, THE ANSWER TO THAT IS YES. THESE MEN HAD OTHER MOTIVATION TO GET MY CLIENT. WHY DO YOU THINK THEY TOOK THE DRUG DOG THERE?

THE COURT: WELL, THAT'S NOT BEFORE THE COURT. I DON'T HAVE ANYTHING OF THAT BEFORE THIS COURT, MR. POPE.

Mr. POPE: WHAT'S THAT, YOUR HONOR?

THE COURT: SOME ULTERIOR MOTIVE TO SAYING SOMETHING HAPPENED WHEN, IN FACT, IT DIDN'T.

MR. POPE: YOUR HONOR, ONE OFFICER ADMITTED THERE WAS A FEDERAL LAWSUIT FILED BY MY CLIENT, I BELIEVE, AGAINST SIMPKINS. FIRST, ONE OF THEM ADMITTED TALKING TO HIM FOUR TIMES ABOUT HIS MESSY YARD. THIS IS A MESSY YARD CASE.

THE COURT: AND, THEREFORE, THEY ARE GOING TO –

MR. POPE: AND THEREFORE, THEY ARE GOING TO LIE TO SOMEBODY ELSE THAT THEY ARE WORKING FOR TO GET THAT SEARCH WARRANT. THEY DON'T CARE. THEY ARE NOT THE ONES WHO SIGN UNDER PENALTY OF PERJURY THAT EVERYTHING IN THERE IS TRUE AND CORRECT OR THEY [133] BELIEVE IT TO BE.

AND DETECTIVE WALL BELIEVED THEM. I DON'T HAVE ANY DOUBT ABOUT THAT. BUT HE – HE'S AS MUCH A VICTIM AS IS MY CLIENT. THESE TWO MEN COME UP WITH A STORY ABOUT SEEING TRACKS AND THEN WHEN QUESTIONED, OH, WELL, THEY WEREN'T REALLY TRACKS, THEY WERE GOUGES. AND THEN WHEN THEY COME INTO COURT, THEY DENY THE WORD, GOUGES. THAT WAS THEIR WORD. THEY DENY THAT.

YOUR HONOR, YOU KNOW, THE – THE EVALUATION OF THE TESTIMONY, IT GOES OUTSIDE OF WHAT THE FACTS ARE. AND IT GOES TO MOTIVATION AND INCONSISTENT STATEMENTS. YOUR HONOR, THEY ARE IN FLAT CONTRADICTION. THE DEPUTIES WANT THE MAGISTRATE TO BELIEVE THAT DETECTIVE WALL SHOWED THEM – THAT THEY SHOWED DETECTIVE WALL THIS – THIS ONE

SCRATCH, INDENTATION, GOUGE LINE, WHATEVER YOU WANT TO CALL IT. AND IT'S SIMPLY NOT TRUE. HE DIDN'T SEE ANYTHING. HE DIDN'T EVEN SEE THE ALLEGED TIRE MARKS IN THE SOFT SAND. HE DIDN'T SEE THAT EITHER.

AND SO WHY WAS A DOG BROUGHT IN? BECAUSE THERE IS ULTERIOR MOTIVE. THERE IS NO EVIDENCE OF ANY DRUGS.

THE COURT: WELL, A DOG WAS BROUGHT IN AT A LATER TIME. THE COURT IS UNDER THE IMPRESSION – THE ARGUMENT – THE OPENING IMPRESSION THE COURT WAS GIVEN BY COUNSEL, THE DOG WAS THERE –

MR. POPE: ALL RIGHT.

[134] THE COURT: – BEFORE.

MR. POPE: THE OTHER QUESTION, YOUR HONOR, IS WHY DIDN'T THEY DIG UP THAT AREA THAT APPEARED TO BE RAKED OVER IF THEY BELIEVED IT WAS SOMETHING THERE? AND, NO. 2, WHY DID THEY GO IN PEOPLE'S HOUSES? WHAT ARE THEY LOOKING FOR INSIDE PEOPLE'S HOUSES?

THE COURT: THE SUGGESTION WAS THAT MAYBE THE TIRE TRACKS WERE RIGHT – WENT RIGHT THROUGH THE GATE.

MR. POPE: YOUR HONOR, THAT AFFIDAVIT, IF YOU TAKE IT AT FACE VALUE, IT'S SO SIMPLE. WE HAVE GOT TRACKS. WE GOT EVIDENCE OF BURYING. WE HAVE GOT A PIECE OF PROPERTY THAT MAY HAVE COME FROM THAT TRUCK. THAT'S A

PRETTY SLAM-DUNK WARRANT IF ALL OF THAT IS TRUE. AND THE MAGISTRATE, OF COURSE, HAS NO WAY OF KNOWING THAT IT'S TRUE. HE HAS TO RELY ON THE HONOR AND INTEGRITY OF LAW ENFORCEMENT. AND DETECTIVE WALL, YOU KNOW – HE RELIED ON SIMPKINS AND SPITULSKI.

AND, YOUR HONOR, I BELIEVE THAT THE – THERE IS SUFFICIENT TESTIMONY THAT THE COURT COULD CONCLUDE THAT THAT, WAS, IN FACT, FALSE. AND UNBEKNOWNST TO DETECTIVE WALL, IT'S NOT RELIABLE.

MY – MY OTHER QUESTION IS WHY DID THEY GO INTO A HOUSE LOOKING FOR AN ENGINE, LOOKING FOR WHEELS? THAT DOESN'T REALLY ADD UP. AND I THINK ALL THAT EVIDENCE GOES TO THE INDICIA OF [135] THEIR BAD FAITH IN THE MATTER.

THE COURT: YOU MEAN DURING THE EXECUTION OF THE SEARCH WARRANT?

MR. POPE: YES.

MR. ESCOBEDO: RIGHT.

THE COURT: OKAY.

MR. ESCOBEDO: AND THERE IS NO EVIDENCE WHATSOEVER IN THE AFFIDAVIT THAT THERE IS ANY TYPE OF DRUG ACTIVITY AT ALL. NO MENTION OF NARCOTICS.

THE COURT: WELL, THE SEARCH WARRANT WASN'T LIMITED TO THE OUTSIDE OF THE

PREMISES. IT COMMANDED THE DEPUTIES TO SEARCH THE WHOLE THING.

MR. ESCOBEDO: YEAH, THEY COULD GO INSIDE, OUTSIDE, ABOVE, BELOW, EVERYWHERE LOOKING FOR CAR PARTS. IT'S OVERBROAD.

MR. POPE: JOIN, YOUR HONOR.

MS. NAJERA: IF I MAY YOUR HONOR, BRING EVERYONE'S ATTENTION TO ATTACHMENT NO. 2, PAGE 2.

THE KEY TO A STOLEN CAR AND CAR PARTS CASES ARE THE LITTLE ITTY-BITTY VIN PLATES THAT COULD BE HIDDEN ANYWHERE, AS THIS COURT KNOWS, AND THE FIRST THING THAT THEY HAD ON THAT THING THAT THEY NEED TO FIND WAS THE VIN PLATE. AND THOSE CAN BE HIDDEN ANYWHERE, AS COUNSEL SAYS, UP, ABOVE, DOWN BELOW, ANYWHERE IN THE HOUSE. AND THAT'S THE KEY TO MAKING A CASE ON A CHOP SHOP, FRANKLY, AS WE ALL KNOW.

MR. ESCOBEDO: DID THEY FIND ANY INDICATION [136] OF A CHOP SHOP? NO. ANY STOLEN PROPERTY? NO.

NONE OF THESE CLIENTS – DEFENDANTS HAVE BEEN CHARGED WITH POSSESSION OF STOLEN ITEMS. IT'S BEEN EIGHT, NINE MONTHS SINCE THE INCIDENT, NO CHARGES, BECAUSE NONE OF THESE ITEMS SEIZED EVER TURNED OUT TO BE STOLEN. THEY WERE ALL LAWFULLY OWNED BY MR. CUSKEY.

THE COURT: AND THE TRUCK?

MR. ESCOBEDO: THE TRUCK, THAT – WELL, SOMEONE TOOK IT AND DETECTIVE WALL IS FOLLOWING THAT INVESTIGATION. BUT CUSKEY HAD NOTHING TO DO WITH IT. HE'S NOT CHARGED WITH IT.

MR. POPE: YOUR HONOR, MY CLIENT'S PERSONAL TRUCK WAS REMOVED FROM THE PROPERTY, APPARENTLY, BECAUSE THERE WAS A PIECE OF – A DROP OF GLUE THAT HAD SOMEHOW HIDDEN ONE OF THE NUMBERS. NOW, THE OFFICERS KNEW THAT VEHICLE WAS NOT STOLEN. THEY TOOK IT AND THEY STILL HAVE IT. AND WE WOULD ASK THE COURT ORDER THEM TO RETURN IT.

THE COURT: OKAY.

ANY OBJECTION TO THE RELEASE OF THE TRUCK?

MS. NAJERA: YOUR HONOR, WE WOULD – WE ALWAYS HAD NO OBJECTION TO IT, BUT MR. CUSKEY WAS SUPPOSED TO SEND A REPRESENTIVE WITH THE PAPER SHOWING IT WAS HIS. HE'S SPOKEN WITH THIS OFFICER. THIS OFFICER KEEPS ASKING HIM, GIVE ME SOME PAPERWORK AND IT'S DONE. BUT WE HAVE YET TO SEE IT.

[137] MR. POPE: NO ONE HAS TALKED TO ME.

I ASSUME MY CLIENT CAN HANDLE THAT.

NO ONE HAS MENTIONED THAT TO ME AS HIS COUNSEL, HOWEVER.

MS. NAJERA: WELL, I THINK YOUR CLIENT IS MENTIONING IT TO YOU NOW.

THE COURT: ALL RIGHT.

ANYTHING FURTHER FROM EITHER SIDE?

MR. ESCOBEDO: NO, YOUR HONOR.

I THINK IF YOU REMOVE, CONSIDER THE MATERIAL MISSTATEMENTS, MATERIAL OMISSIONS, YOU LOOK AT THE OVERALL PICTURE AND YOU REMOVE THOSE ITEMS, THIS AFFIDAVIT DOES NOT STAND UP TO THE CONSTITUTIONAL TEST. AND I ASK THAT THE MOTION BE GRANTED.

THE COURT: ALL RIGHT.

I'M GOING TO READ SOME OF THE MATERIAL HERE THE MAGISTRATE HAD BEFORE IT THAT ON AUGUST 3RD. AND I WON'T INCLUDE ALL THE DETAILS.

CERTAIN DEPUTIES ON PATROL DISCOVERED A WHITE PICKUP PARKED ACROSS THE STREET FROM – AND THE MISTAKE HERE IS 214 THIRD STREET. AND THE TESTIMONY IS THAT IT SHOULD HAVE BEEN – HE LOOKED ACROSS THE STREET AND SAW 234 THIRD STREET.

MS. NAJERA: 234, YOUR HONOR.

THE COURT: 234 THIRD STREET AND PUTS 214 THIRD STREET WHEN, IN FACT, IT WAS 241 THIRD STREET.

[138] IT JUST SEEMS TO ME THAT THAT'S THE KIND OF MISTAKE THAT PEOPLE MAKE EVERY DAY. AND THE COURT DOES NOT GET THE IMPRESSION

THAT IT WAS AN ATTEMPT TO PUT AN ADDRESS THAT DOESN'T EXIST, 214 THIRD STREET IN FRONT OF THE DEFENDANT'S RESIDENCE.

DEPUTY SIMPKINS AND SPITULSKI SAW THAT THE VEHICLE WAS MISSING THE FOLLOWING ITEMS: BOTH LICENSE PLATES, VIN NUMBER LOCATED ON THE DASHBOARD, THE ENGINE, THE TRANSMISSION, DRIVE SHAFT, RADIATOR, ENGINE HOOD, DRIVER'S SIDE DOOR, PASSENGER SIDE DOOR. THE DEPUTIES OBSERVED THAT THERE WERE SPACE SAVER TYPE – EMERGENCY TIRES MOUNTED ON THE RIGHT FRONT AND LEFT REAR OF THE PICKUP, THERE WAS A WHITE SPOKE TYPE WHEEL WITH A SONIC BRAND TIRE MOUNTED ON THE LEFT FRONT. THAT'S PRETTY SPECIFIC. THEY ALSO SAW THERE WAS A FIRESTONE BRAND TIRE MOUNTED ON THE RIGHT REAR.

THE DEPUTY SAW A BLACK TRUCK LINER BEHIND THE FENCE NEAR THE ABOVE DESCRIBED TIRES AND RIMS. THAT SHOULD BE ON ANOTHER PAGE, THAT ONE SENTENCE, AS TESTIFIED – TESTIFIED BY SERGEANT WALL.

DEPUTIES NOTICED THAT THERE WAS OIL ON THE FRONT CROSS MEMBER OF THE PICKUP TRUCK, ENGINE RECENTLY WAS REMOVED.

THIS IS ACTIVITY THAT'S HAPPENED – HAPPENING OR JUST HAPPENED.

IN AN ATTEMPT TO LOCATE WHERE THE VEHICLE CAME FROM, THEY SAW TIRE TRACKS LEADING BACK [139] TO A FENCE AT THE END OF A LONG DRIVEWAY.

AND I DON'T KNOW WHY YOU ARE DISTURBED ABOUT THAT WORD, DRIVEWAY, MR. ESCOBEDO.

THEY SAW TIRE TRACKS LEADING BACK TO THE FENCE. HE SAYS THESE TIRE TRACKS APPEARED TO MATCH THE TREAD PATTERN ON THE TIRES CURRENTLY MOUNTED ON THE TRUCK. AND – AND, CLEARLY, THE TIRE TRACKS COULD BE LEFT IN THAT AREA, THAT SOFT AREA THERE IMMEDIATELY AFTER THE GATE.

WHEN THE DEPUTY REACHED THE ABOVE FENCE, THEY SAW THAT THE GATE WAS CLOSED, THE TIRE TRACKS STOPPED AT THE ENTRANCE. THEY SAW AN AREA THAT WAS RAKED, FRESHLY RAKED AND WATERED. AND THE AFFIANT SAYS, AS WOULD BE INDICATIVE OF AN ATTEMPT TO DISGUISE FRESH TIRE TRACKS AND MOTOR – OR MOTOR VEHICLE FLUIDS. AND HE SPECIFIES WHAT.

HE ALSO SAYS THE DEPUTIES OBSERVED THREE WHITE SPOKE TYPE WHEELS AND TIRES WHICH APPEARED TO MATCH THE WHEEL AND THE TIRE MOUNTED ON THE LEFT FRONT OF THE PICKUP TRUCK, ORANGE TARPAULIN COVERING WITH THE SAME DIMENSIONS AS THE ENGINE THAT WAS REMOVED FROM THE PICKUP TRUCK.

CONTACTED THE OWNER. MR. CUSKEY SAID HE WAS THE SOLE OCCUPANT, DIDN'T HAVE ANY KNOWLEDGE OF THE PICKUP AND THAT IT WASN'T ON HIS PROPERTY. DECLINED PERMISSION.

AND THE AFFIANT RESPONDED TO THE LOCATION OF THE PICKUP, NOW IN ATTACHMENT 8,

LINE 12. [140] AND THE DEPUTIES PERSONALLY ADVISED HIM OF THEIR OBSERVATIONS.

AND THE ONLY CONFLICT OR – I DON'T EVEN WANT TO CHARACTERIZE IT AS A CONFLICT. WELL, I GUESS YOU COULD CHARACTERIZE IT AS A CONFLICT. THE DEPUTIES SAID THEY POINTED IT OUT. THE SERGEANT SAYS HE DOESN'T ACTUALLY RECALL THEM POINTING IT OUT BUT DID TELL HIM ABOUT IT INSTEAD.

HE THEN EXAMINED THE VEHICLE AND SAW THAT BOTH NUMBERS HAD BEEN REMOVED. IT WAS IMPOUNDED.

I DON'T SEE WHAT OTHER CONCLUSION A MAGISTRATE WOULD COME TO. IT'S REASONABLE TO BELIEVE THAT THE TRUCK CAME FROM THOSE PREMISES BASED ON WHAT'S IN THIS AFFIDAVIT. AND TO CRITICALLY VIEW AREAS WHERE COUNSEL IS SUGGESTING THAT THE COURT DISBELIEVE, YOU WOULD STILL COME TO THAT CONCLUSION.

AND NO ONE HAS SHAKEN THIS – THERE IS NO CONTRADICTION AT ALL ABOUT THE INFORMATION HERE ABOUT THE TIRE IMPRESSIONS, TIRE TRACKS WITH THE SAME TREAD PATTERN AS MATCHES THESE ON THE TRUCK IN FRONT OF THE GATE. NOTHING.

LET'S SAY THERE WAS NO TESTIMONY AT ALL ABOUT ANYTHING OUT ON THIRD STREET. ALL A MAGISTRATE COULD – LET'S JUST TAKE ALL THAT OUT AND NOT EVEN CONSIDER THAT. THE MAGISTRATE (SIC) THEN SEES A STRIPED TRUCK A COUPLE BLOCKS FROM THE DEFENDANT'S HOME.

THEY SEE – THEY GO TO THE [141] DEFENDANT'S HOME AND THEY SEE THREE TIRES WHICH MATCH ONE OF THE TIRES ON THE TRUCK. THEY SEE A TREAD PATTERN IMMEDIATELY AT THE GATE THAT MATCHES THE TREAD PATTERN THAT'S ON THE TRUCK. WHAT – WHAT'S THE REASONABLE CONCLUSION THAT THE MAGISTRATE WOULD COME TO? HE WOULD COME TO THE CONCLUSION THAT THAT TRUCK CAME OUT OF THAT PROPERTY. SO THE COURT IS GOING TO DENY YOUR MOTION.

ALL RIGHT.

MS. NAJERA: YOUR HONOR, I THINK WE'RE ON A TRIAL DATE. I HAD SPOKEN TO COUNSEL ABOUT THE FACT THAT THEY WOULD LIKE TO SET THIS OVER FOR – FOLKS?

MR. POPE: NO, YOUR HONOR, WE DO HAVE A SEPARATE TRIAL MOTION, TOO, WHICH I WOULD ASK THE COURT TO CONSIDER AT THIS TIME.

THE COURT: THAT'S MR. CUSKEY, WHO IS CHARGED WITH 12021?

MR. ESCOBEDO: YES, HE IS CHARGED WITH A WEAPONS VIOLATION.

THE COURT: AND HE'S NOT CHARGED WITH 11378. MR. OJALA PLEADED TO THAT.

MR. LONGORIA IS PRESENTLY CHARGED WITH 11378 AND MR. CUSKEY WITH 12021. THE ONLY THING THEY HAD IN COMMON IS THAT THE SEARCH WARRANT LED TO THE TWO OF THEM.

MS. NAJERA: THAT'S CORRECT.

THE COURT: MISS NAJERA, YOU WANT TO ARGUE [142] THE – WHY YOU DON'T BELIEVE IT WOULD BE PREJUDICIAL TO TRY THOSE TOGETHER?

MS. NAJERA: ACTUALLY, YOUR HONOR, I WASN'T PREPARED TO – I DIDN'T KNOW THIS MOTION WAS SET. I'M TOTALLY CAUGHT HERE, EMBARRASSED TO SAY, KNOW NOTHING – I CAME HERE SPECIFICALLY FOR A MOTION TO TRAVERSE. I DIDN'T KNOW THE OTHER MOTION EXISTED SO . . .

THE COURT: WE CAN PUT THAT MOTION OVER TO THE TRIAL DATE.

MS. NAJERA: THAT WOULD BE GREAT. I JUST – THERE IS NO SENSE ME TRYING TO WING IT AT THIS POINT.

THE COURT: I UNDERSTAND.

BUT SOMEONE SHOULD BE PREPARED TO ARGUE THAT MOTION.

MS. NAJERA: I BELIEVE MR. WEYANT ALREADY IS. AND HE WAS P[RE]PARED TO DO THIS AND DO THE TRIAL, AS A MATTER OF FACT. MY UNDERSTANDING, HE HAD EVERYTHING EXCEPT FOR THIS MOTION, SO I DIDN'T KNOW.

THE COURT: ALL RIGHT.

IS THERE A POSSIBILITY OF DISPOSITION IN THE CASE?

MR. ESCOBEDO: THERE HAS BEEN AN OFFER, 180 DAYS OF CAL TRANS, YOUR HONOR.

THE COURT: SOUNDS LIKE A GENEROUS OFFER.

[143] MS. NAJERA: THAT'S A NICE OFFER. I DIDN'T MAKE IT, BUT IT SOUNDS LIKE A NICE OFFER.

THAT WAS KIND OF HIM.

WELL, THERE WAS A PENDING NORWALK.

THE COURT: IF YOU DON'T AGREE WITH THE COURT'S RULING, YOU COULD ENTERTAIN THAT DISPOSITION AND ASK FOR A CERTIFICATE OF PROBABLE CAUSE AND PROCEED.

MR. POPE: WE'RE IN A SLIGHTLY DIFFERENT POSITION.

THE COURT: WHAT'S YOUR OFFER?

MS. NAJERA: ONE YEAR COUNTY JAIL, APPARENTLY.

MR. POPE: WITH RESPECT TO COUNT 1, WE HAVE FILED A 995, WHICH THE COURT DENIED. IT – HE – MY CLIENT HAD BEEN CONVICTED OF 11376, I BELIEVE – 78?

SERGEANT WALL: 77.

MR. POPE: 77.

THE COURT: WHEN?

MR. POPE: IN SAN BERNARDINO. IT WAS ABOUT – THE COURT ALREADY DENIED THE MOTION.

THE COURT: I HAVE TWO THINGS HERE FOR YOUR CLIENT, MR. POPE.

MR. POPE: AND THE OTHER ONE, YOUR HONOR, IS A MISDEMEANOR THAT HE WAS CONVICTED OF, A SPOUSAL SITUATION WHICH, APPARENTLY, THE RULE IS YOU CAN'T HAVE WEAPONS FOR TEN YEARS AFTER THAT.

[144] WE NEED TO SEE THE PLEA IN THAT CASE BECAUSE THE MINUTE ORDER –

THE COURT: THIS WAS A MISDEMEANOR?

MR. POPE: YEAH, IT WAS.

THAT ONE, THERE IS NO DOUBT IT WAS A MISDEMEANOR.

THE COURT: ALL RIGHT.

MR. POPE: THE – THE MINUTE ORDER ON THE TERM OF PROBATION DOES NOT HAVE THE DON'T OWN GUNS BOX CHECKED. I NEED TO LOOK AT THE PLEA TO SEE WHETHER THE COURT, WHEN IT ADVISED HIM OF THE TERMS OF PROBATION, TOLD HIM THAT. OTHERWISE, I THINK I MAY HAVE A LEGAL ARGUMENT.

THE COURT: WITHOUT DOING THAT, CAN WE DISPOSE OF THE CASE TODAY?

MR. POPE: NO, I DON'T BELIEVE SO.

THE COURT: ALL RIGHT.

AND WHAT WAS THE OFFER ON MR. CUSKEY?

MS. NAJERA: MR. CUSKEY IS, APPARENTLY, A YEAR, YOUR HONOR.

THE COURT: OKAY.

MS. NAJERA: YOUR HONOR, I'M CURIOUS. DOES THE COURT KNOW ANYTHING ABOUT MR. LONGORIA'S FELONY OUT OF NORWALK?

MR. ESCOBEDO: THAT WAS DISMISSED. HE WAS PICKED UP AND IT WASN'T EVEN FILED.

MS. NAJERA: WASN'T FILED?

[145] IT WAS FILED, VA055884. I'LL JUST RUN IT. NEVER MIND.

THE COURT: 10851 IN '78, THREE MONTHS SUMMARY.

PARDON ME.

36 MONTHS SUMMARY. GOT A 594, GOT A 415, GOT A 166.

THEY WERE TOGETHER WHEN THESE 166'S – ON THESE 166 CASES, MR. LONGORIA AND CUSKEY?

MR. POPE: THEY ARE INDICATING NO.

MR. ESCOBEDO: NO. COINCIDENCE.

THE COURT: SAME COURT.

MR. ESCOBEDO: YEAH.

DEFENDANT LONGORIA: YEAH, LIVE IN THE SAME SQUARE THERE.

THE COURT: AS A MATTER OF FACT, MR. LONGORIA HAS TWO OF THEM.

THE DEFENDANT: TWO OF WHAT?

THE COURT: ALL RIGHT.

SO ON OCTOBER 28, '99, THE GRAND THEFT THAT MR. LONGORIA WENT TO PRELIMINARY HEARING IN WHITTIER, YOU ARE SAYING WAS DISMISSED?

MR. ESCOBEDO: YES, YOUR HONOR.

MS. NAJERA: OKAY.

THE COURT: WHILE THE COURT BELIEVES THAT IT'S A LITTLE ON THE GENEROUS SIDE, THE COURT WILL GO ALONG WITH 180 CAL TRANS, IF HE WERE TO ACCEPT IT.

[146] (DEFENDANT AND HIS COUNSEL CONFER SOTTO VOCE.)

MR. ESCOBEDO: YOUR HONOR, THE COURT – I'D LIKE – I NEED TO TALK TO MY CLIENT. COULD THE COURT KEEP THAT OPEN FOR THE NEXT COURT DATE?

THE COURT: ALL RIGHT. ALL RIGHT.

ALL RIGHT. TRIAL DATE AND MOTION TO SEVER. WHAT DATE DO YOU WANT? WE'RE ON MARCH 16.

MR. ESCOBEDO: WE'RE ON THE 20TH, YOUR HONOR.

THE COURT: OH, SO WE'RE TRAILING.

MR. ESCOBEDO: ZERO OF 10.

MS. NAJERA: YEAH.

THE COURT: I HAVE TRIAL DATE, MARCH 16 PLUS.

THE CLERK: TODAY IS FOUR OF 10, YOUR HONOR.

MS. NAJERA: I THINK WE'RE FOUR OF TEN TODAY.

COUNSEL HAS NO OBJECTION TO CONTINUING IT?

MR. WEYANT IS ON VACATION AND WON'T BE BACK FOR ANOTHER TWO WEEKS. I CAN REASSIGN THIS, IF YOU WANT TO DO IT, OR IF COUNSEL WOULD LIKE TO TALK TO THEIR CLIENT, I WOULDN'T BE OPPOSED TO CONTINUE IT, IF THEY WAIVE TIME.

[147] THE COURT: WHAT TIME DO YOU WANT?

MS. NAJERA: ANY TIME SECOND WEEK OF APRIL IS FINE.

MR. ESCOBEDO. APRIL 3RD. ZERO OF 10 ON THE 3RD.

MS. NAJERA: THAT'S FINE.

THE COURT: ALL RIGHT. APRIL 3RD TRIAL DATE.

AND –

MR. ESCOBEDO: JUST LIKE TO LET THE COURT KNOW APRIL 14TH, I'M UNAVAILABLE.

THE COURT: ALL RIGHT. YOU WANT TO TAKE THE TIME WAIVERS, SOMEONE?

MS. NAJERA: YES, IF I MAY, YOUR HONOR.

MR. CUSKEY AND MR. LONGORIA. DEFENDANT LONGORIA.

MR. CUSKEY, MR. LONGORIA, EACH OF YOU HAS THE RIGHT TO HAVE YOUR TRIAL HEARD WITHIN TEN DAYS OF MARCH 16. MY UNDERSTANDING IS THAT YOU ARE BOTH GOING TO AGREE TO WAIVE TIME AND PUT THIS OVER TO APRIL 3RD WITH THE UNDERSTANDING WE WILL TRY YOU ON APRIL 3RD OR WITHIN TEN DAYS OF APRIL 3RD.

IS THAT OKAY WITH YOU, MR. CUSKEY?

DEFENDANT CUSKEY: YES.

MS. NAJERA: AND YOU AGREE AND WAIVE TIME TO THAT DATE?

DEFENDANT CUSKEY: YES.

[148] MS. NAJERA: AND DO YOU, MR. LONGORIA, DO YOU AGREE TO THE DATE OF MARCH 3RD – I'M SORRY – APRIL 3RD OR WITHIN TEN DAYS OF THAT DATE?

DEFENDANT LONGORIA: YES.

MS. NAJERA: COUNSEL JOIN?

MR. ESCOBEDO: YES.

MS. NAJERA: MR. POPE, JOIN?

MR. POPE: YES.

MS. NAJERA: PEOPLE JOIN.

THE COURT: TR[IA]L DATE APRIL 3RD, PLUS 10. TIME IS WAIVED.

MR. CUSKY AND MR. LONGORIA, YOU ARE ORDERED TO RETURN TO THIS COURT AT NINE O'CLOCK WITHOUT FURTHER NOTICE OR ORDER.

AND MR. OJALA –

MR. POPE: THANK YOU, YOUR HONOR.

THE COURT: – WHAT ARE WE DOING ON THE OJALA MATTER, MISS NAJERA?

MS. NAJERA: MR. OJALA SHOULD BE REMANDED, YOUR HONOR.

THE COURT: WHAT WAS HIS SENTENCE?

MS. NAJERA: IT WAS ONE YEAR IN COUNTY JAIL.

THE DEFENDANT: I DID SEVEN MONTHS ON IT.

MS. NAJERA: OKAY.

I THINK HE HAS TO BE – I'LL ASK THE BAILIFF.

WOULD HE HAVE TO BE PROCESSED?

[149] HE HAS TO BE RELEASED TECHNICALLY THROUGH THE JAIL.

THE DEFENDANT: I HAVE BEEN RELEASED THROUGH THE JAIL.

THE COURT: YOU WERE RELEASED BY THIS COURT, MR. OJALA, IS THAT CORRECT?

THE DEFENDANT: YES, SIR.

THE COURT: YOU WEREN'T RELEASED BY THE SHERIFF?

MS. NAJERA: IT MIGHT BE –

THE COURT: YOU HAVE DONE SEVEN ACTUAL MONTHS?

MR. ESCOBEDO: HE HAS BEEN IN CUSTODY SINCE AUGUST 3RD.

THE DEFENDANT: OVER SEVEN MONTHS.

MS. NAJERA: IT'S VERY POSSIBLE THEY SIMPLY HAVE TO PROCESS HIM. I THINK IF WE DO NOT SEND HIM BACK, THEY ARE GOING TO SHOW HIM AS LOST IF THEY DON'T PROCESS HIM OUT.

THE COURT: NOW, IF WE GIVE HIM TIME SERVED AND ORDER HIM TO THE PROBATION DEPARTMENT –

MS. NAJERA: THAT'S FINE. WHATEVER THE COURT THINKS IS APPROPRIATE.

THE COURT: ALL RIGHT.

ALL RIGHT. MR. LONGORIA –

MR. ESCOBEDO: OJALA.

THE COURT: OJALA. PARDON ME, SIR.

ALL RIGHT. TIME SERVED.

[150] MINUTE ORDER WILL REFLECT DEFENDANT HAS GOT TIME SERVED. AND THAT'S – YOU KNOW HOW MANY MONTHS THAT WAS?

DEFENDANT OJALA: A LITTLE OVER SEVEN MONTHS.

THE COURT: WHAT WAS HIS ARREST DATE?

DEFENDANT OJALA: AUGUST 3RD – AUGUST 4TH.

(THERE WAS A DISCUSSION HELD OFF THE RECORD, NOT REPORTED.)

THE COURT: ALL RIGHT. 227 DAYS ACTUAL, PLUS 113. 340. ALL RIGHT.

MS. NAJERA: THAT'S FINE, YOUR HONOR.

THE COURT: FOR THE MINUTE ORDER, IT WILL BE COUNTY JAIL, 227 DAYS, PLUS 113, FOR A TOTAL OF 340 DAYS TIME SERVED.

REPORT TO YOUR PROBATION OFFICER NO LATER THAN THE 22ND, WEDNESDAY, BEFORE THEY CLOSE.

PROBATION WILL CONTINUE ON THE SAME TERMS AND CONDITIONS.

DEFENDANT OJALA: OKAY. YOU GOT A CARD WHERE I GO TO?

THE COURT: YES.

WILL YOU GIVE HIM ONE OF THOSE CARDS.

ALL RIGHT.

SO YOU ARE DONE.

[151] MR. ESCOBEDO: OKAY. THANK YOU, SIR.

THE COURT: ALL RIGHT.

(PROCEEDINGS CONCLUDED.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. EA "E" HON. DAVID S. MILTON, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA PLAINTIFF, VS. MICHAEL CHARLES CUSKEY, RANDY LONGORIA, DEFENDANTS.	)	NO. KA045491 REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I, SHARON BAKER FOX, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 151 COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER ON MARCH 20, 2000.

DATED THIS 17TH DAY OF SEPTEMBER, 2000.

/s/ Sharon Fox CSR # 4332
OFFICIAL REPORTER

EXHIBIT "E"

ORIGINAL

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS,	)	**No. CV 00-11106**
Plaintiff,	)	**(AHM) (AJWx)**
	)	
vs.	)	
GIL GARCETTI, Individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually, and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 through 10, Inclusive	)	
Defendants.	)	

DEPOSITION OF GILBERT GARCETTI

Tuesday, October 16, 2001

* * *

[25] that needed my attention; but as the C.E.O., I set the policy. I set the priorities with the assistance of others and formulating that, but that was my role, my responsibility.

Q. Okay. I don't think I asked this question like this, but I'll try it here. Even though you're actively involved in your reelection campaign in 2000, would you have been the person in the district attorney's office that ultimately

would have decided which deputies were going to be promoted in 2000 from grade 3 to grade 4?

A. Yes.

Q. Okay. And tell me what that involves in terms of you doing that in 2000, not generally, but let's talk about it in 2000.

A. Again, the process was in place, and I helped create the process, and the process – once we made a decision that there were going to be promotions and we had a rough number of promotions to be made, we expected our – what we call directors like a George Kinoke to make contact with all the head deputies who are the deputy in charge of people who supervised the people who were on – in this essence what we referred to as a grade 4 list. They were grade 3 deputies wanting to become [26] grade 4 deputies. We'd get their input. "All right. Tell me about deputy 'A.' Who are your top candidates? Why should we promote them?"

All the directors would do that. They would then come to a meeting with the three assistant district attorneys and the chief deputy. The chief deputy would chair that meeting. There'd be a general discussion then about "All right. If we have ten positions, you know, who deserves it?" And a general discussion – the chief deputy ultimately makes the final decision as to "Okay. These are the top ten. This is the list that I'm going to give to the D.A."

He – or if it were Sandy Dechita, the chief deputy before Bob Heflin – would bring it to me. I would review it. I could delete. I could add. I would ask questions. "Why is this person on here? Why isn't someone else on there?" And ultimately, I would sign off.

Q. Okay. So in order to get into the – well, let me see. Would you know – be able to give me a range of numbers as to how many people would have been eligible in August of 2000 to move from – well, to be promoted from grade 3 to grade 4, and approximately how many would have actually obtained

* * *

[30] essence, carry the flag for those he believes deserve a promotion. If he knows that everyone of his supervisors has, say, five people, he knows not everyone can get a promotion. So who are the one or two or three or four or five, six who deserve the promotion?

Q. From each particular office?

A. Right.

Q. Okay. Now, to your knowledge, are there notes or records that are kept, say, between the director and the district attorney in charge of an individual office as to how that list of eligibles is, say, prioritized or anything at all like that?

A. I'm not aware of any, anything written.

Q. All right. So although one could be eligible to be promoted, it sounds like, to me, they would still need their deputy in charge to prioritize them in order to have a shot at being promoted to a grade 4.

A. Yes and no. I mean, that's the most important thing, but that person may have just come to Pasadena, for example, has only been there for three months; so maybe there's another supervisor who has greater input or a different director who supervised that person.

[31] So when they come together now, all the directors, assistant D.A.'s come together, that's when information is shared again. "Well, this person worked for me. He may be working for you now, but he was fabulous when he worked for us."

Q. Okay. Now, it sounds like, to me, that, by the time you get involved in the process of actually personally ratifying who in 2000 is going to become a grade 4 from a grade 3, you actually have a – pretty much a reduced list. You've got a list –

A. I have a list of 40 recommendations. It's not 42, and I can knock off 1 or 2.

Q. Okay.

A. This is it.

Q. Okay. But it sounds like, to me, that you actually go through each of the people, and do you review something, or is this a conversation where you expect other people to have reviewed it and be able to answer questions or –

A. It's a conversation I have with the chief deputy. And I will go down, and many of the people I know. I've worked with them. Some of the people I don't know, or maybe someone isn't on the list because I will then look at the master list and go down the master list too. "Well, why isn't this [32] person on this list?"

Q. Okay. So do you have a recollection whether in 2000 you did that, you looked at the master list and saw some folks that you thought maybe belonged on that list?

A. Well, there you asked two questions.

Q. I'm sorry.

A. One, yes, I did look at the list, I'm sure. Two, do I recall saying that there's some people who belong on that list? No. I don't recall.

Q. Okay. Now, would it be a fair statement – well, let my back up for a second first.

Are you aware of where the particular assignment is when that honed down list gets to you? Are you aware of where those grade 3 deputies are at the time you're looking at the list? Does that make sense?

A. Yeah, it makes sense. I may not be aware, but I'll ask the chief deputy.

Q. Okay. Now, just from being around for 29 years, I understand that you and Mr. Sunstedt have a good relationship.

A. Yes.

Q. Okay. And you've worked together – well, let me ask you. Let's include your time in the –

* * *

[34] promotability – that they would carry significant weight with you?

MS. LEE: At what time?

MR. BECERRA: In 2000. Thank you.

THE WITNESS: Yes. But understanding that every head deputy carries a flag for their people – and my job is not just to compare who the best people are in a particular branch office like in Pomona but to take a look at the office as a whole, and it could be that they have 99

percent stars in Pomona, or they could have 99 percent dogs in Pomona.

BY MR. BECERRA:

Q. Okay. Do you remember in – whether or not in 2000 any Pomona grade 3's stood out in your mind for whatever reason?

A. In 2000?

Q. The list is announced in August of 2000.

A. Yeah. There are probably two that I can think of. Kathy Cady and Manny Garcia. I don't remember who else was on the list out of Pomona. It might have been promoted –

MS. LEE: Do you want the list?

MR. BECERRA: Yeah. Thanks.

[35] BY MR. BECERRA:

Q. Just take a look at it. Thank you. This was exhibit B in a different deposition.

(Plaintiff's Exhibit B was marked for identification by the court reporter and is attached hereto.)

BY MR. BECERRA:

Q. Anyone else kind of stand out in your mind?

MS. LEE: From just Pomona or just overall?

MR. BECERRA: No. Just Pomona.

MS. LEE: And I think –

THE WITNESS: Well, I don't know who else was from Pomona.

MS. LEE: For the record, Mr. Sunstedt did testify. I think he drew little circles. There's four Pomona people that he –

MR. BECERRA: That actually got promoted. Yeah. Little dots.

THE WITNESS: Manny Garcia. No. No one else.

BY MR. BECERRA:

Q. So what stood out in terms of Kathy's – I'm sorry. Ms. Cady's performance as a district attorney?

A. I just – both Kathy and Manny Garcia – [36] they both had worked in the family violence division downtown, and I was personally pretty close to some of the people there and heard about their trials; and so I knew a little more about what they had done, and I know Kathleen had handled some very difficult cases –

Q. Okay.

A. – in family violence.

Q. Okay. And I'm sorry to – and was that also true with Manny Garcia?

A. Manual Garcia, yes.

Q. And Fernando Guzman didn't stand out in any way?

A. No. I knew Fernando from downtown. Good lawyer, but I didn't know anything more.

Q. How about Donald Clem?

A. I didn't – I'd never worked with Donald Clem.

Q. All right. Did you have any recollection of having any personal contact with deputy district attorney Richard Ceballos, the plaintiff in this case?

A. Any personal contact?

Q. Yeah, before these –

A. Other than saying, "Hello"? Yeah. I don't [37] recall. We certainly didn't work together, and I don't recall talking to him about any particular case.

Q. Okay. Do you ever recall speaking – well, let's back up.

In 2000 Mr. Sunstedt has now been in Pomona, I guess, approximately three years or so, having left his position in the top of your administration.

Did you have any regular contact with him at all?

A. No.

Q. Any contact you would have had would have been what? At meetings, say, of – with heads of offices?

A. No. On occasion I would just call and see how he's doing, but that was infrequent.

Q. Would you have been made aware of a deputy district attorney's allegations of police perjury in 2000 which is – I'm not talking about Rampart's now. I'm talking about post Rampart. Would that kind of information had made its way to you if you had a line deputy that was making allegations of police misconduct with regards to the securing of a search warrant?

* * *

EXHIBIT "F"

ORIGINAL

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS,	)	
Plaintiff,	)	
vs.	)	**No. CV 00-11106 (AHM) (AJWx)**
GIL GARCETTI, individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive,	)	
Defendants.	)	

DEPOSITION OF CAROL NAJERA

Thursday, September 20, 2001

* * *

[150] court and then a Grade 3. You could call them co-calendar deputies, two-calendar deputies, anything you want to call them, but the bottom line is a Grade 4 was a Grade 4 and the Grade 3 was a Grade 3.

Q. But wasn't Kathy Cady a Grade 3?

A. Yes.

Q. And then in July of 2000, she is now calendar deputy or a co-calendar deputy or a back-up calendar deputy or whatever you want to call her?

A. Whatever you want to call her. Right.

Q. And Mr. Ceballos no longer is?

A. That's correct. That's in July, not in March. You were asking me about in March right after the Cuskey thing did he lose his calendar position, and I told you nothing happened, first of all, until April until we collapsed. Then after we collapsed in April, Frank had told Mike Grosbard, Debra Passow, Don Clem and Mr. Ceballos in my presence and he pretty much informed every Grade 3, open and notoriously in Pomona, that Kathy, who had come to us, was only going to be filing for – I believe he said six months, but I think she ended up filing longer, and then she was going to get transferred into calendaring and they were going to be transferred into filing.

* * *

[152] I'm not sure if there was an open calendar position more than the fact that both Mr. Clem and Mr. Ceballos were told they would be the next ones up to fill, and Mr. Clem got transferred; so that only left Mr. Ceballos.

Q. Did you know when Mr. Ceballos was told that?

A. This was told in the presence of all four calendar deputies around the time that Kathy Cady got there.

Q. Roughly when would that have been, as best as you can recall?

A. We can find that out, but it was when Kathy Cady first arrived.

Q. Would that be in '99 or 2000?

A. Like I said, it's something I can find out really easy for you, but I don't remember right now.

Q. If we were to use the Cuskey case as a benchmark, could we say whether it was before or after Cuskey?

A. Before Cuskey.

Q. Months before?

A. A few months, yes. I don't know how many months before, but it was before Cuskey in terms of months.

[153] Q. And you know from the grievance and you know from the lawsuit that there is an allegation that there is a murder case that you specifically took away from Mr. Ceballos as a result of the actions that he took and you assigned to a less experienced Grade 2?

Are you familiar with that accusation?

A. Yes.

Q. That's not true? You didn't do that in retaliation for that?

A. That is not true.

Q. You didn't do it in retaliation?

A. I not only didn't do it in retaliation, but I think – I may have physically taken the file from Mr. Ceballos, I didn't make the ultimate decision.

Q. Who made that decision?

A. Mr. Sundstedt.

Q. Did you talk to him about that decision before it was made?

A. Only in that Frank wanted me to go to all of the calendar deputies, and probably only because he didn't have time, and find out what murders they had. He was trying to figure out – basically, I think it was twofold. He wanted to know what all the murders were because I wasn't really good at keeping track of [154] that as I should have, and he also was trying to find a murder case for Mike Dauber and Steve Gallon to do.

Q. When was that, if we can use Cuskey as –

A. I don't remember.

Q. Was it before or after Cuskey?

A. I don't remember.

Q. Do you remember going to each of the calendar deputies trying to find out what their – I don't want to say backlog – but what their case load was on 187 murders?

A. I specifically went to every calendar deputy and asked them what their case was and a little blurb about what their case was, and I gathered all that information.

Q. Do you know how many murder cases were pending at the time that you did this?

A. I think everyone had like between two and three, but I don't think Michael Grosbard had any. If he did, it was something real complicated.

Q. The total number of murders would be how many?

A. I don't remember right now.

Q. We can just do the math.

A. That's what I was going to say. Do the math. I'd say –

* * *

[157] I went in there and he said "How dare you?" and throw a punch or anything.

Q. Other than taking this particular 187 away from any of the deputies and assigning it in this case to – it's Mr. Gallon that got it?

A. Correct.

Q. Did you take any of the other 187s away from any of the other deputies and assign those to Mr. Gallon or anyone else?

A. I didn't take this one; so I didn't take any of them from anybody.

Q. All right. Were you involved in any way – let's do it this way: Do you know if any other 187s were taken away for the same reason from any of the other deputies and reassigned to the two people you mentioned earlier?

A. I believe that Ms. Moe also had a case that was reassigned to one of these deputies.

Q. Do you remember the name of that case?

A. No.

Q. Do you actually remember that or do you think that that may have happened?

A. I think that's what happened.

Q. Would you have been the one that mechanically picked up the file and made the [158] transfer?

A. She might have taken it to him, too. I really don't know.

Q. But did you do the actual mechanics of it? Did you actually do that with Mr. Ceballos?

A. I don't know if I mechanically did it or if he did it or if he gave it to Steve or if I took it and gave it to him. I don't recall.

Q. Are you concerned at all as to whether or not Mr. Ceballos, who is – let's go over one other incident.

Mr. Ceballos is going to wind up doing filings out in Rio Hondo; correct?

A. Correct.

Q. How did that come about?

A. We had – Well, Frank had to staff a full-time filing deputy in Pomona, and we had a part timer at the time. He needed a full-time person – in Rio Hondo we had a part timer at the time. So we needed a filing deputy.

Q. And you were aware that Mr. Ceballos lived pretty close to the courthouse in Pomona?

A. Yes.

Q. Rio Hondo, I guess, what we call El Monte Court?

[159] A. Yes.

Q. It's located in El Monte?

A. Correct.

Q. Is that particular position – a filing deputy – is that like an – in your opinion, do you consider that a sought-after position for an experienced trial attorney in the district attorney's office?

A. Sought after, no.

Q. Why is that? Why do you think that?

A. I think trial deputies like to do trials. I don't think they like to file or I don't think it's the first choice.

Q. First choice would be to do trials, if you are a trial deputy?

A. Correct.

Q. Before Mr. Ceballos is transferred to Rio Hondo, do you talk to him about the fact that there is going to be a transfer away from his position as a trial deputy in Pomona?

A. Yes.

Q. The decision to transfer him, who makes that decision?

A. Mr. Sundstedt.

Q. Does he discuss it with you before he does [160] it?

A. He discussed the fact he needed a filing deputy and that he had already told Richard and Don that they were the next two up and Don was gone.

We went through all the Grade 3s. The Grade 3s that we had were going to be Grade 3 positions obviously. Of all the Grade 3s that we had, if you eliminate the ones that do domestic violence and sexual assault and then you limit the ones that are doing the EDP, the early disposition program and you eliminate the ones that are already filing and you eliminate the ones that are doing domestic violence, that only left us with, like, I think, four. Of those four, I believe that two were pregnant and were going to go on maternity leave. One had just gotten there, just been transferred out there to Pomona because of family problems, and the last one left was Mr. Ceballos.

Q. What was the reason that you needed a full-time filing deputy in Rio Hondo?

A. We had historically always had two full-time filing deputies in Rio Hondo. The work, the work load.

Q. It would be the work load, and that's historically how it had been staffed?

* * *

Supreme Court, U.S.
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No. 04-473

In The Supreme Court of the United States

GIL GARCETTI, FRANK SUNDSTEDT, CAROL NAJERA and COUNTY OF LOS ANGELES,

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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CINDY S. LEE
Counsel of Record
JIN S. CHOI
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Telephone (818) 545-1925
Facsimile (818) 545-1937
Counsel for Petitioners

BONNIE I. ROBIN-VERGEER
Counsel of Record
SCOTT L. NELSON
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
Telephone (202) 588-1000
Facsimile (202) 588-7795
Counsel for Respondent

Petition For Certiorari Filed October 1, 2004
Certiorari Granted February 28, 2005

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OR CALL COLLECT (402) 342-2831

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DANILO J. BECERRA, ESQ, SBN 56526
MORENO, BECERRA, GUERRERO & CASILLAS
A Professional Law Corporation
3500 West Beverly Boulevard
Montebello, CA 90640-1541
Telephone: (323) 725-0917
Facsimile: (323) 725-0350

HUMBERTO GUIZAR, ESQ. – SBN – 125769
LUIS A. CARRILLO, ESQ. – SBN 70398
Attorneys at Law
3500 W. Beverly Boulevard
Montebello, CA 90640-1541
Telephone: (323) 725-1151
Facsimile: (323) 725-0350

Attorneys for RICHARD CEBALLOS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, Individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually, and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 through 10, Inclusive, Defendants.	CASE NO: CV 00-11106 (AHM) (AJWx) **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DANILO J. BECERRA** ***[PLAINTIFF'S STATEMENT IN OPPOSITION TO DEFENDANTS' SEPARATE STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW AND APPENDIX OF EXHIBITS ARE FILED CONCURRENTLY HEREWITH]***

DATE: January 28, 2002
TIME: 10:00 a.m.
PLACE: Courtroom 14

COMES NOW Plaintiff RICHARD CEBALLOS in opposition to Defendants GIL GARCETTI, FRANK SUNSTEDT and CAROL NAJERA's Motion for Summary Judgment set for hearing on January 28, 2002.

For the following reasons, Plaintiff submits that the present motion should be denied:

1. There are material issues of facts as to whether Defendants NAJERA and SUNSTEDT initiated a campaign of harassment against Plaintiff following his exercise of his First Amendment right to report police misconduct to his supervisors.

2. Further there is a dispute of material facts as to whether defendant GARCETTI ratified the conduct of Defendants NAJERA and SUNSTEDT when he was informed of the retaliation.

This opposition is based upon this Notice of Opposition; the Memorandum of Points and Authorities; the Declarations of Danilo J. Becerra; Terry White; Jaime Hernandez; Plaintiff's Response to Defendants' Statement of Genuine Issues in Opposition to Defendants' Motion for Summary Judgment, filed concurrently herewith; the Appendix filed concurrently herewith; the attached exhibits; the files and records in this case; and any further evidence that may be adducted upon a hearing on said motion.

Plaintiff submits that triable issues of fact exist and, therefore, Defendants GIL GARCETTI, FRANK SUNSTEDT

and CAROL NAJERA's present Motion for Summary Judgment should be denied, in its entirety.

DATED: January 10, 2002
MORENO, BECERRA, GUERRERO & CASILLAS
A Professional Corporation

BY: /s/ Danilo J. Becerra
DANILO J. BECERRA, Esq.
Attorney for Plaintiff
RICHARD CEBALLOS

DATED: January, 1, 2002
LAW OFFICES OF HUMBERTO GUIZAR

BY: /s/ Humberto Guizar
HUMBERTO GUIZAR, Esq.
Attorney for Plaintiff
RICHARD CEBALLOS

DATED: January 10, 2002
LAW OFFICES OF LUIS CARILLO

BY: /s/ Luis Carillo
LUIS CARILLO
Attorney for Plaintiff
RICHARD CEBALLOS

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants GIL GARCETTI, FRANK SUNSTEDT and CAROL NAJERA presently move this Court for an order granting them summary judgment in this matter.

II. STATEMENT OF FACTS

Plaintiff works for the Los Angeles County District Attorney's Office ("COUNTY"). CEBALLOS Depo at 10:17-19. Plaintiff commenced working for Defendant COUNTY in 1989. See, CEBALLOS Depo., at 13:12.

Sometime in 1997 or 1998, Plaintiff began working in the Pomona Branch of Defendant COUNTY's offices. See, CEBALLOS Depo., at 15:8-10. About a year after Plaintiff began his employment at the Pomona Branch of Defendant COUNTY'S offices, Plaintiff was assigned to work as a calendar deputy. See, CEBALLOS Depo., at 15:18-22. Plaintiff continued in this assignment until approximately May or June of 2000. See, CEBALLOS Depo., at 18-22.

As a calendar deputy, Plaintiff had supervisorial and other functions that trial deputies did not have. See, CEBALLOS Depo., at 51:13-52:6.

At the time, Defendants CAROL NAJERA ("NAJERA" herein) and FRANK SUNSTEDT ("SUNSTEDT" herein) immediately supervised Plaintiff. See, CEBALLOS Depo. at 16:19-22.

One to two weeks prior to March 2, 2000, attorney Richard Escobedo, defense counsel for one of the defendants in the *People v. Cuskey*, Case Number KA045491, case, approached Plaintiff to discuss concerns he had about the veracity of the Sheriff's Department's deputies on that case regarding evidence. See, CEBALLOS Depo., at 59:10-25; 60:7-9. Plaintiff, in an effort to fulfill his duties as a district attorney, conducted an investigation of the matter and concluded there were serious problems with the warrant by which certain "evidence" was obtained against one of the *People v. Cuskey* defendants. See,

CEBALLOS Depo., at 69:7-74:17. At this point, Plaintiff presented his findings to Defendants SUNSTEDT and NAJERA who both agreed that the warrant in question posed problems. See, CEBALLOS Depo., at 74:18-23.

On or about March 2, 2000, Plaintiff prepared a memorandum to Defendant SUNSTEDT regarding his opinions as to the veracity of the testimony of the officers in the *People v. Cuskey* case. See, CEBALLOS Depo., at 44:13-16. Plaintiff presented this memo assuming that, based on the memo, the case would be dismissed. See, CEBALLOS Depo., at 87:20-22. Defendant SUNSTEDT, concerned about the Sheriff's Department's reaction to the report, instructed Plaintiff to edit the language of the report to not make it so "accusatory." See, CEBALLOS Depo., at 90:21-24.

On or about March 9, 2000, plaintiff CEBALLOS met with Defendants SUNSTEDT and NAJERA, Deputy District Attorney Steven Gallon, Captain Binkley, and Sheriff Lieutenant Barstow to discuss the above-mentioned memo Plaintiff authored. See, CEBALLOS Depo., at 55:12-20. This meeting was held at the direction of Defendant SUNSTEDT at the demand of the Sheriff's Department. See, CEBALLOS Depo., at 56:1. During this meeting, Lieutenant Barstow attacked Plaintiff for the memorandum he prepared in the course and scope of his employment. See, CEBALLOS Depo., at 98:5-8. Captain Binkley expressed that he wanted the case to proceed in order to avoid a civil suit. See, CEBALLOS Depo., at 105:10-17. All of Plaintiff's work in preparing this memo and recommendation for dismissal was pursuant to his belief that he, as a Deputy District Attorney, had to make an "independent decision as to whether or not to go forward with the case." See, CEBALLOS Depo., at 99:21-23.

Plaintiff, in a zealous pursuit of his client's interests, still looked for a way around the irregularities and misrepresentations in the search warrant and, not finding any, decided he had to dismiss the case See, CEBALLOS Depo., at 104:9-18.

Within a week of the March 9th meeting, Defendant SUNSTEDT demoted Plaintiff from his calendar deputy position. See, CEBALLOS Depo., at 45:17-18. Upon the termination of his duties as calendar deputy and demotion to trial attorney, another Grade III Deputy District Attorney replaced him in the department in which he served as calendar attorney. See, CEBALLOS Depo., at 139:18-20.

Plaintiff informed Defendants SUNSTEDT and NAJERA that defense counsel subpoenaed him and intended to use him for the traverse hearing. See, CEBALLOS Depo., at 121:7-8.

Plaintiff, following his duties under *Brady v. Maryland,* (1963) 373 U.S. 83; 83 S.Ct. 1194, informed Defendant NAJERA that the memos Plaintiff had prepared regarding his opinions of the search warrant should be turned over to the defense. See, CEBALLOS Depo., at 121:9-11. Defendant NAJERA, in clear violation of *Brady,* instructed Plaintiff to edit the memos to reflect only the statements of detective Walls. See, CEBALLOS Depo., at 121:14-16. Mr. George Knoke of the District Attorney's office also informed Plaintiff that he should not turn over *Brady* material to the defense because the police may sue him. See, CEBALLOS Depo., at 264:17-21

A few days before the hearing that Plaintiff had been subpoenaed to testify in regarding the warrant, Defendant NAJERA summoned Plaintiff into her office. See, CEBALLOS Depo., 124:3-4. When Plaintiff informed her he was

going to testify truthfully about his opinions, she threatened him. See, CEBALLOS Depo., at 124:22-125:1. Furthermore, at the hearing on the traverse motion, according to Judge Milton, Defendant NAJERA was rude and hostile toward Plaintiff. See, CEBALLOS Depo., at 190 16-24. Defendant SUNSTEDT, though being Plaintiff's direct supervisor, gave him the "silent treatment" in retaliation for using his reporting the misconduct to exercise his prosecutorial discretion. See, CEBALLOS Depo., at 220:14-23.

Toward the end of August to the beginning of September 2000, Defendant NAJERA summoned Plaintiff into her office and informed Plaintiff that his position as trial attorney was being changed. See, CEBALLOS Depo., at 24:20-23. At this time, Defendant NAJERA informed Plaintiff that he could not remain in the Pomona Branch unless he resigned himself to filing misdemeanors. See, CEBALLOS Depo., at 25:11-14. This position was one typically assigned to junior Deputy District Attorneys and, as such, demeaning to plaintiff CEBALLOS. See, CEBALLOS Depo., at 27:4-15. This forced Plaintiff's transfer to the El Monte Branch of the District Attorney's Office. See, CEBALLOS Depo., at 29:10-12. This was done as a retaliatory act of "Freeway Therapy," a practice of punishing a deputy district attorney who does not play by the rules by giving him an assignment necessitating a long commute. See, CEBALLOS Depo., at 27:16-24.

In further retaliation for his decision, Defendant NAJERA stripped Plaintiff of the one murder case he was handling at the time, and gave it to a Grade II Deputy with no experience in murder case. See, CEBALLOS Depo., at 141:20-144:25. The purpose behind taking this murder case from Plaintiff was to affect his ability to promote within the District Attorney's Office. See CEBALLOS Depo., at 146:14-23. Defendants further denied

Plaintiff the opportunity to work on any other murder cases. See, CEBALLOS Depo., at 148:2-3.

The next incident of retaliation occurred in about October of 1999. See, CEBALLOS Depo., at 150:18-22. Even though Plaintiff scored highly on the promotional test and had more experience than other deputies, those deputies were chosen and Plaintiff was not. See, CEBALLOS Depo., at 156:2-16. The decision to promote Plaintiff lied uniquely in the hands of Defendants SUNSTEDT. See, CEBALLOS Depo., at 159:19-160:11.

Plaintiff suffered this retaliation as a result of exercising his First Amendment Rights, following his professional and ethical duties to the court as a prosecutor, Defendant GARCETTI allowed the retaliatory conduct in this case, despite knowledge that plaintiff had exercised his First Amendment Rights and followed his professional and ethical duties to the court as a prosecutor indisclosing police perjury.

III. LAW

A. PLAINTIFF'S SPEECH IN REPORTING SUSPECTED POLICE PERJURY TO HIS SUPERVISOR NAJERA AND DISTRICT ATTORNEY SUNSTEDT WAS PROTECTED BY THE FIRST AMENDMENT SINCE IT CONCERNED A MATTER OF VITAL PUBLIC CONCERN

1. Plaintiff As An Experienced Prosecutor Who Had Conducted A Thorough Investigation of the Deputies' Conduct Had An Absolute Right to Report His Findings Without Fear of Retaliation.

A violation of section 1983 may occur when an employee is retaliated against for speech protected by the

First Amendment. *Connick v. Myers,* 461 U.S. 138, 145, 103 S.Ct. 1684, 1689 (1983). *Mt. Health City Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568 (1983).

"Speech concerning public affairs is more than self-expression, it is the essences of self government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers,* 461 U.S. 138, 145, 103 S.Ct. 1684, 1689 (1983). A public employee's First Amendment Rights are violated if his employer takes an adverse employment action against the employee because of that employee's protected speech. *Mt. Health City Board of Education v. Doyle,* 429 U.S. 274, 283, 97 S.Ct. 568, 574 (1983).

In order to prevail on Plaintiff's First Amendment claim, a plaintiff must initially prove that his speech was constitutionally protected, i.e. That his statements "substantially involved matters of public concern." *Johnson v. Multnomah County,* 48 F.3d 420, 422 (9th Cir.), cert. denied, 515 U.S. 1161, 115 S.Ct. 2616 (1995); *Connick v. Myers,* 461 U.S. at 146, 103 S.Ct. at 1689. Speech involves matter of public concern when it can fairly be considered to relate to "any matter of political, social or other concern to the community." *Connick v. Myers,* 461 U.S. at 146, 103 S.Ct. at 1690; *Johnson v. Multnomah County,* 48 F.3d at 422. Whether an employee's speech addresses a matter of public concern must be determined by the *content, form,* and *context* of a given statement, as revealed by the whole record. *Connick v. Myers,* 461 U.S. 147-48, 103 S.Ct. at 1690. For speech to be of a public concern, it need *not to be communicated publicly. Givhan v. Western Line Consolidated School Dist.,* 439 U.S. 410, 415, 99 S.Ct. 693, 696-97 (1979) (Freedom of speech not "lost to the public employee

who arranges to communicate privately with his employer rather than to spread his views before the public").

In making its determination, the Court must arrive at *balance* between the interests of the public employees as a citizen, in commentating upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through employees. *Pickering v. Board of Education of Township High School District,* 391 U.S. 563, 568, 88 S.Ct. at 1734-35 (1968). The State's burden in justifying a particular adverse employment action varies depending upon the nature of the employee's expression *Connick v. Myers,* 461 U.S. at 150, 103 S.Ct. at 1691. A stronger showing may be necessary if the employee's speech more substantially involved matters of public concern. *Id.* at 152, 103 S.Ct. at 1692-93.

Moreover, a public employer has *no legitimate interest* in covering up *mismanagement or corruption. Johnson v. Moltnomah County,* 48 F.3d 420, 427 (9th Cir.) cert. denied, 515 U.S. 1161, 115 S.Ct. 2616 (1995).

Plaintiff CEBALLOS in late April, 1990, and early March, began an investigation of the truthfulness of the allegations in the affidavit used to secure a search warrant by Los Angeles Sheriff's Deputies in *People v. Cuskey,* No KA04541. CEBALLOS first was contacted by Defense counsel while working as a calendar deputy. Plaintiff carefully reviewed the file and went to the scene where the officers had allegedly made their observations. After viewing a videotape of the scene and reading the officers's averments in the declaration he was convinced that the officer had deliberately misled the magistrate that issued the warrant. Additionally, CEBALLOS discovered that one

of the defendants had sued one of the Deputies and that this information should have been made known to the magistrate but was not disclosed.

Plaintiff CEBALLOS actually called Deputy SUNSTEDT and NAJERA into his office, showed them the videotape and explained the falsehoods that were in the declaration. SUNSTEDT agreed that there were problems with the warrant's declaration and authorized CEBALLOS to seek immediate release of one of the Defendants that was in custody and instructed him to prepare a disposition memorandum so that the case could be dismissed.

CEBALLOS prepared the disposition memorandum but the case was not dismissed when the Sheriff's officials voiced their opposition to such a dismissal and expressed concerns that they could be sued. There was no further or new investigation conducted by Defendant SUNSTEDT and NAJERA to justify continuing the prosecution with the questionable evidence.

Plaintiff CEBALLOS was required to attend a meeting with the involved Sheriff Deputies where he was berated and told he was acting like a defense lawyer. Plaintiff was not allowed to respond to the Deputies' accusations nor did Defendants NAJERA or SUNSTEDT attempt to defend his actions.

When it became apparent that CEBALLOS would not back away from the results of his investigation of the *Cuskey* case it was taken over by his supervisor NAJERA and efforts were made by her to force CEBALLOS to alter his report before turning it over to the defense pursuant to *Brady v. Maryland*. When CEBALLOS refused to mislead the defense by changing the report, a redacted copy was supplied upon his insistence.

Plaintiff's speech addressed matters of concern because it related to matters of political, social or other concern to the public. See, *Connick v. Myers*, 461 U.S. at 146, 103 S.Ct. at 1689. Specifically, Plaintiff's speech involved activities by law enforcement that is a essential concern to the public. The integrity and truthfulness of law enforcement officers is always a vital concern to the public especially in March of 2000, following Los Angeles Police Officer Raphael Perez's revelations as to the widespread police corruption within the Rampart unit of the Los Angeles Police Department. See, *Voigt v. Savell*, 70 F.3d 1552, 1562 (9th Cir. 1995) cert. denied, 517 U.S. 1209, 116 S.Ct. 1826 (1996) (allegations of criminal wrongdoing and abuse of power involve matters of inherent public concern); *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992) (memorandum exposing, *inter alia*, abuses, potential civil rights violations, and incompetence of public officials addressed matters of public concern). The conduct of the Sheriff deputies reported by CEBALLOS also implicated civil rights violations of the Fourth Amendment Rights of the Defendants in *Cuskey*.

Defendants' reliance upon *Brewster v. Board of Education*, 149 F. 3d 971, 981 (9th Cir. 1998) for the proposition that plaintiff cannot establish his statements to supervisors involved matters of public concern is misplaced. Recently, the Ninth Circuit made clear in *Hufford v. McEnaney*, 249 F.3d 1142 (9th Cir. 2001) that in a good-faith whistleblowing context, the breath of one's audience is irrelevant. *Id.* at 2497 3rd at 1151. The court noted it would be absurd to extend First Amendment protection only to those whistleblowers who immediately appear on the local news. *Id.* 249 F.3d at 1151. The Court found in *Hufford* that plaintiffs reporting the downloading of

pornographic materials by fellow firefighters lies to his supervisors at the core of the First Amendment regardless of the audience. *Hufford v. McEnaney,* 249 F.3d 1142.

California courts have held that district attorneys have a First Amendment Right to keep the public informed, respond to media questions, and ask other law enforcement agencies to conduct their own investigation. *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1113-1115; 57 Cal.Rptr. 207. The California Supreme Court made clear in a similar situation that also involved allegations of false statements made by law enforcement officers to obtain a search warrant that any contrary holding would impermissibly chill the exercise of First Amendment Rights by government employees as stated in Gov. Code §§ 26505.5, which states that a district attorney may sponsor, or participate in any project to improve the administration of justice. See *Id.*, at 1116.

This case mirrors *Bradbury,* which clearly states that, like the *Bradbury* district attorney Plaintiff had a First Amendment Right to keep the public informed, issue the report, respond to media questions, and ask other law enforcement agencies to conduct their own investigation. In this case, Plaintiff CEBALLOS had a First Amendment Right to keep the public informed, issue his report, respond to the Court's and defendant's counsel's questions, and ask the District Attorney's Office, as the law enforcement agency that it is, to conduct its own investigation into his belief that the officers in this case were lying.

Defendants' retaliation against him for exercising his First Amendment Rights had nothing to do with the prosecution of a case, a key element in a finding of immunity.

In this case, Plaintiff wrote the memo expressing concern about the veracity of the officers in this case pursuant to his duties as a prosecutor. See, CEBALLOS Depo. at 44:13-16; 69:7; 74:14. Based on these concerns, and pursuant to his duties, he turned this memo over to defense counsel pursuant to *Brady v. Maryland,* (1963) 373 U.S. 83, 83 S.Ct. 1194, 102 L.Ed.2d 215. Despite the illegal order of Defendant NAJERA to not produce this memo to defense counsel (See, CEBALLOS Depo., at 120:21; 122:4), Plaintiff, in fulfilling his duties as a prosecutor, produced the memo and testified truthfully at trial.

Granting this motion would chill deputy district attorneys from performing their prosecutorial functions. It will advise all deputy district attorneys that, no matter what their professional opinion as a prosecutor, if they do not play by the rules, no matter how illegal the rules are, they will be subject to the liability of harassment and retaliation by their superiors and that said harassment and retaliation is subject to immunity.

Even though plaintiff spoke on the matter of public concern, the Defendants may be entitled to summary judgment if they show that the speech so severely damaged office harmony and the working relationship, that the government's interest in promoting an effective workplace outweighs the Plaintiff's First Amendment Rights. *Johnson v. Multnomah, supra,* at 426, 48 F.3rd at 426, quoting *Hyland v. Wonder,* 972 F.2d at 39. The employer bears the burden of proving that the balance of interests weighs in its favor. *Johnson v. Multnomah, supra,* at 426. The more tightly the First Amendment embraces the speech, the more vigorous a showing of disruption must be made. *Hyland v. Wonder,* 972 F.2d at 1139.

Defendants have not shown any disruption or injury to its legitimate needs that would justify retaliation against Plaintiff CEBALLOS for exposing possible police corruption and perjury. The Defendants are required to show both a disruption and actual injury to its legitimate interests. *Johnson v. Multnomah, supra,* 48 F.3d at 427.

The Ninth Circuit has recognized:

> "[t]he First Amendment balancing test [of Pickering] can hardly be controlled by a finding that disruption did occur. An employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office." *Id.* quoting *O'Donnell v. Yanchulis,* 875 F.2nd. 1059, 1062 (3rd Cir. 1989).

In this case, Defendants cannot claim that they have a legitimate interest in covering up police perjury or corruption and cannot justify retaliation against whistleblowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure. See, *Johnson v. Multnomah, supra,* 483 F.3d at 427. Nor are the district attorney's office legitimate interests injured if the individual defendants were undermined by truthful statements exposing their own wrongdoing in bowing to the pressure of the Sheriff's Department. If the Court were to hold otherwise, some of the most important public employee speech exposing government corruption, wrongdoing or incompetence would be left outside the First Amendment aegis. *Id.*, quoting *Hyland v. Wonder, supra,* 972 F.2d at 1138; see also, *Voigt,* 70 F.3d at 1562 (where allegations

involve criminal wrongdoing, burden on employer in demonstrating that its interests outweigh the First Amendment interest of employee is "correspondingly onerous").

Defendants contend that Plaintiffs statements regarding the falsehoods in the affidavit of the Sheriff were untrue and proven so by the Superior Court's denying the Motion to Traverse the Warrant. Firstly, plaintiff was in no way reckless to ascertain the truth. He reviewed the file, went to the scene, reviewed the videotape made of the scene and clearly determined that there were misstatements made to the magistrate that issued the warrant. He then showed the videotape to other district attorneys in the office who all agreed that the declaration was false, and when he explained the situation to Defendant SUNSTEDT and NAJERA, Defendant readily agreed that there were problems with the warrant and immediately authorized the release of one of the Defendants from custody. It was only after the Sheriff's Captain and Deputies began objecting to the dismissal and implying that Plaintiff was acting like a defense lawyer, and that the Sheriffs could be sued that SUNSTEDT changed his decision about dismissing the case and proceeding with the questionable evidence. There was no new evidence presented nor a scene investigation such as was conducted by Plaintiff, but a decision by Defendants in bowing to pressure from the Sheriff's Department. There is nothing to suggest that Plaintiff did anything other than conduct a thorough and neutral evaluation of the facts that was concurred initially both his supervisors.

The disagreement with the Court as to the falsity of the declarations did not relieve the District Attorneys assigned to the case to make their own assessments and

act accordingly. Recent history in Los Angeles County has demonstrated a whole scale failure to recognize rampant perjury by the Superior Court judiciary in the Rampart scandal.

B. THE LAW WAS CLEARLY ESTABLISHED THAT A STATE EMPLOYEE SUCH AS PLAINTIFF CEBALLOS COULD NOT BE SUBJECTED TO RETALIATION FOR REPORTING POLICE PERJURY AND CORRUPTION TO HIS SUPERIORS, THEREFORE, THERE IS NO QUALIFIED IMMUNITY AVAILABLE TO THE DEFENDANTS.

No reasonable official in the position of Defendants NAJERA, SUNSTEDT, and GARCETTI could have reasonably believed that it was permissible to retaliate against the Plaintiff CEBALLOS for reporting what he believed to be police perjury and corruption in the *Cuskey* matter. Although the Defendants correctly cite authorities in the Ninth Circuit that discuss the difficulty of establishing clearly established rights in the context of a state employee exercising First Amendment Rights. Defendants fail to point out that this Circuit has drawn a clear line for government employers where the employee's speech involves wrongdoing or corruption, the disruption generated by an employee's accurate exposition of such conduct should not be factored into the *Pickering* balance. *Johnson v. Multnomah County, supra,* 48 F.3d at 427 (9th Cir.) *Moran* relied upon by the Defendants makes clear that the government must show that speech concerned with unlawful activities must be highly disruptive to justify any restriction. *Moran v. Washington,* 147 F.3d 839, 849 n.6 (9th Cir. 1998).

Defendants recognize that as the immunity defense has evolved, it provides ample protections to all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs,* 475 U.S. 336, 341 (1986). In instant case, Defendants knowingly violated Plaintiff's First Amendment Rights and are not entitled to any protection.

C. THE CAMPAIGN OF HARASSMENT CONDUCTED BY DEFENDANTS CANNOT BE OBJECTIVELY REASONABLE WHERE THE PURPOSE WAS TO RETALIATE AGAINST DEFENDANT HAVING EXERCISED HIS CONSTITUTIONAL RIGHTS.

The Defendants contend that the actions they took were objectively reasonable in light of the facts and circumstances confronting Defendants when they acted with regard to the Plaintiff CEBALLOS and therefore there can be no violation of Plaintiff's constitutional rights. *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151 (citing *Graham v. Connor,* 490 U.S. 386, 397) (1989).

Defendants contend that they took no adverse employment actions towards Plaintiff following his investigation and reporting of police perjury in the *Cuskey* matter. Defendants contend creating a hostile work environment, ignoring him, assigning him to a former municipal court for "freeway therapy" all involve actions that would have occurred in the normal course of events. In order for Defendants to establish that their conduct was objectively reasonable, they must show they would have taken the same actions as to the plaintiff's employment states even in the absence of protected expression. *Mt. Health City Board of Education v. Doyle, supra,* 274, 287; *Schwatzman v. Valenzuela,* 846 F.2d 1212 (9th Cir.) (1988).

Following the Plaintiff's protected expression and his preparation of the disposition memorandum he was immediately subjected to a hostile working environment. Plaintiff was forced to attend the meeting with the Deputies involved in the perjured affidavit where he was ridiculed and berated. Plaintiff who had previously been evaluated and recognized as a outstanding deputy district attorney was forced to watch as his supervisors allowed the Sheriff's Department Deputies to intimidate the Defendants into abdicating their responsibilities to independently evaluate the evidence and proceed with evidence that was highly questionable. Considerations wholly irrelevant to the criminal justice process were used by the Sheriffs' to insist upon continuing the criminal case, i.e., fear of a civil lawsuit. Plaintiff was not allowed to say anything with regards to the improprieties that had occurred in the investigation during the meeting with Sheriff's personnel.

Plaintiff's work environment immediately became hostile as Defendants proceeded to threaten Plaintiff with adverse consequences should he continue insisting that the Deputy's declaration was false and he would quickly find himself being given the "silent treatment" from his immediate supervisors. Plaintiff's prestigious position of calendar deputy was taken away and difficult murder case is taken away from him to be tried by a lesser deputy with no experience in handling murder cases. Plaintiff is offered to do low level work filing misdemeanors should he chose to remain in the Pomona Branch of the Court.

Defendants attempt to offer explanations for each of the adverse actions that take place but careful examination of the facts indicates that when the hostility did not work to alter Plaintiff's exercise of his First Amendment

speech rights Defendants increased the consequences against him.

There was no prior taking away of murder cases from any deputy district attorney to extend experience to lesser experienced attorneys in the office. There was no need to any additional filing Deputies in the Rio Hondo Branch of the District Attorney's office. Declarations submitted by the Deputies at Rio Hondo indicate clearly there was no need for Plaintiff to do any filing and after he was removed following the election of Steve Cooley, a part-time Deputy was used to replace Plaintiff at the Court.

Plaintiff had earned the right to be promoted to a Grade IV Deputy District Attorney. Defendant SUNSTEDT held the key to that promotion since it was only in his communication to the director George Knoke that would have allowed his name to be submitted to District Attorney GARCETTI for promotion. There was no way possible he would have been fairly considered for promotion with the pattern and practice of retaliation initiated and maintained by Defendants against Plaintiff.

Courts have traditionally held summary judgment is inappropriate when questions of motive predominate in the inquiry about how big a role the protected behavior played in the employment decision. *Peacock v. Duval,* 694 F.2d 644, 646 (9th Cir 1982). Plaintiff CEBALLOS need only prove that his protected activities were a substantial or motivating factor in the adverse employment actions taken against him. *Allen v. Scribner,* 812 F.2d 426, 433 (9th Cir. 1987). Plaintiff has done so in this opposition.

D. DEFENDANT GARCETTI RATIFIED THE CONDUCT OF NAJERA AND SUNSTEDT.

Plaintiff CEBALLOS attempted to handle the retaliation that had occurred through a formal grievance. He sought the help of the Mexican American Bar Association and its President James Blancarte while the grievance was still pending before District Attorney Director George Knoke. It is undisputed that before a formal decision was announced by Knoke, Blancarte spoke with GARCETTI. GARCETTI claims he merely told Blancarte the grievance procedure would handle the matter. Blancarte claims GARCETTI said he would look into it or would handle it. Within days of Plaintiff communicating with Blancarte and being advised GARCETTI had been informed, CEBALLOS' grievance regarding the retaliation of the *Cuskey* matter was denied.

Where government officials adopt and expressly approve of the acts of others who caused the constitutional violation, there is liability. *Hammond v. County of Madera*, 859 F.2d. 797, 802-03 (9th Cir. 1988), disapproved on other grounds in *L.W. v. Grubbs*, 92 F.3d 894 (9th Cir. 1988). In *Fuller v. Oakland*, 47 F.3d. 1522, 1526 (9th Cir. 1995). Judge Poule writing for a unanimous panel held that there was sufficient evidence to support a finding of ratification; when the Chief of Police approved a one-sided and biased investigation which held no harassment. This is what occurred here. Defendant GARCETTI having been advised of the actions of CEBALLOS and being made aware of the concerns of a prominent bar association of the retaliation claims did nothing to prevent the continued constitutional violation of plaintiff's rights and thus ratified the behavior of Defendants NAJERA and SUNSTEDT.

E. PLAINTIFF HAS PROVEN THAT THE DEFENDANTS' CONDUC[T] WAS OUTRAGEOUS AND SHOULD BE ALLOWED TO PROCEED AGAINST THEM ON HIS STATE CAUSES OF ACTION.

Defendant has demonstrated that he was a diligent and ethical prosecutor for the people of the County of Los Angeles. In order to fulfill his obligations, he found it necessary to go into the field and investigate the honesty of his investigating officers to insure that he was meeting his ethical obligations. As a direct result of his actions, he was insulted, threatened, harassed at work, ostracized and demoted. He was ordered to change evidence so as to possibly mislead defense counsel but refused. Plaintiff resisted all attempts to force him to participate in illegal and unethical behavior and suffered financially and emotionally for his refusal.

The emotional distress suffered by him was so bad that he considered resigning from his career as a professional prosecutor with the office, a career he had held since law school. Prior to the incidents of March, 2000, Plaintiff had loved his job and enjoyed representing the people. He was so disturbed and emotionally upset about the events that engrossed him following his disclosures and efforts to insure that justice was done in the *Cuskey* matter, he took sleeping pills and lost enthusiasm to prosecute cases.

The Defendants' conduct was outrageous under the standard set forth in the case cited by Defendants. See, *Cervantes v. J.C. Penney Co.*, 24 Cal.3d 579, 156 Cal.Rptr. 198 (1979). In *Cervantes*, the court held conduct is outrageous where it exceeds all bounds of that usually tolerated in a civilized community. Subjecting Plaintiff to endure

emotional distress for having exercised his First Amendment Rights and for protecting the Fourth Amendment Rights of an accused citizen exceeds all bounds tolerated by a civilized and free society.

Defendants' argument that there is immunity under California Government Code section 821.6 is incorrect. Plaintiff's injury was a direct result of the employment actions taken against him by Defendants and Defendant GARCETTI's ratification of the employment actions and is not conduct for which Government Code section 821.6 is directed.

IV. CONCLUSION

In light of the above, Plaintiff respectfully asserts that Defendants GARCETTI, FRANK SUNSTEDT and CAROL NAJERA's present motion should be denied in its entirety.

Respectfully submitted,

DATED: January 10, 2002

MORENO, BECERRA,
GUERRERO & CASILLAS
A Professional Corporation

BY: /s/ Danilo J. Becerra
DANILO J. BECERRA, Esq.
Attorney for Plaintiff
RICHARD CEBALLOS

DATED: January, 10, 2002

LAW OFFICES OF
HUMBERTO GUIZAR

BY: /s/ Humberto Guizar
HUMBERTO GUIZAR, Esq.
Attorney for Plaintiff
RICHARD CEBALLOS

DATED: January 10, 2002

LAW OFFICES OF
LUIS CARILLO

BY: /s/ Luis Carillo
LUIS CARILLO
Attorney for Plaintiff
RICHARD CEBALLOS

DECLARATION OF DANILO J. BECERRA

I, DANILO J. BECERRA, declare:

1. I am an attorney duly licensed to practice before all the courts in the State of California. I am a partner with the Law Offices of Moreno, Becerra, Guerrero & Casillas, attorneys of record for Plaintiff RICHARD CEBALLOS. I have personal knowledge of the facts contained herein and if called upon could and would competently testify thereto.

2. Attached hereto and incorporated herein by reference as exhibits are true and correct copies of the following documents as identified below:

Exhibit 1: Declaration of Michael Grossbard

Exhibit 2: Declaration of Terry L. White

Exhibit 3: Declaration of Jaime Hernandez

Exhibit 4: Partial Deposition Transcript of Richard Ceballos

Exhibit 5: Partial Deposition Transcript of Frank Sunstedt

Exhibit 6: Partial Deposition Transcript of Carol Najera

Exhibit 7: Partial Deposition Transcript of Gilbert Garcetti

Exhibit 8: Partial Deposition Transcript of Dinko Bozanich

Exhibit 9: Declaration of James E. Blancarte

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 10th day of January 2002, at Montebello, California.

/s/ Danilo J. Becerra
DANILO J. BECERRA, Declarant

DANILO J. BECERRA, ESQ, SBN 56526
MORENO, BECERRA, GUERRERO & CASILLAS
A Professional Law Corporation
3500 West Beverly Boulevard
Montebello, CA 90640-1541
Telephone: (323) 725-0917
Facsimile: (323) 725-0350

HUMBERTO GUIZAR, ESQ. – SBN – 125769
LUIS A. CARRILLO, ESQ. – SBN 70398
Attorneys at Law
3500 W. Beverly Boulevard
Montebello, CA 90640-1541
Telephone: (323) 725-1151
Facsimile: (323) 725-0350

Attorneys for RICHARD CEBALLOS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive, Defendants.	CASE NO: CV 00-11106 (AHM) (AJWx) **PLAINTIFF'S APPENDIX OF EXHIBITS IN SUPPORT OF OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** *[PLAINTIFF'S STATEMENT IN OPPOSITION TO DEFENDANTS' SEPARATE STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IS FILED CONCURRENTLY HEREWITH]* DATE: January 28, 2002 TIME: 10:00 a.m. PLACE: Courtroom 14

COMES NOW Plaintiff RICHARD CEBALLOS and submits his Appendix of Exhibits in Support of Opposition to Defendants GIL GARCETTI, FRANK SUNSTEDT and CAROL NAJERA's Motion for Summary Judgment set for hearing on January 28, 2002.

Exhibit 1:	Declaration of Michael Grossbard
Exhibit 2:	Declaration of Terry L. White
Exhibit 3:	Declaration of Jaime Hernandez
Exhibit 4:	Partial Deposition Transcript of Richard Ceballos
Exhibit 5:	Partial Deposition Transcript of Frank Sunstedt
Exhibit 6:	Partial Deposition Transcript of Carol Najera
Exhibit 7:	Partial Deposition Transcript of Gilbert Garcetti
Exhibit 8:	Partial Deposition Transcript of Dinko Bozanich
Exhibit 9:	Declaration of James E. Blancarte

Respectfully submitted,

DATED: January 10, 2002 MORENO, BECERRA, GUERRERO & CASILLAS
A Professional Corporation

BY: /s/ Danilo J. Becerra
DANILO J. BECERRA, Esq.
Attorneys for Plaintiff
RICHARD CEBALLOS

DATED: January 10, 2002 LAW OFFICES OF HUMBERTO GUIZAR

BY: /s/ Humberto Guizar
HUMBERTO GUIZAR, Esq.
Attorney for Plaintiff
RICHARD CEBALLOS

DATED: January 10, 2002 LAW OFFICES OF LUIS CARILLO

BY: /s/ Luis Carillo
LUIS CARILLO
Attorney for Plaintiff
RICHARD CEBALLOS

EXHIBIT 1

DECLARATION OF MICHAEL GROSBARD

I, MICHAEL GROSBARD, state and declare as follows:

1. I am an attorney duly licensed to practice law in the State of California. I am a Deputy District Attorney employed by the County of Los Angeles.

2. If called upon to testify, I could competently testify to the matters stated herein of my own personal knowledge.

3. I am currently assigned to the District Attorney's office in Alhambra, California.

4. On or about September 16, 2000, I submitted a Memorandum to Mr. George Knoke, the Bureau Director of the District Attorney's office, with regard to the Grievance filed by Richard Ceballos against Frank Sunstedt and Carol Najera.

5. The Memorandum, among other items, included my conversations with Ms. Carol Najera and Richard Ceballos at the Pomona Court house during March and April, 2000. The Memorandum also included my observations of Richard Ceballos and Ms. Carol Najera during this time period, and the interaction of Ms. Najera with Mr. Ceballos.

6. I attach the Memorandum, dated September 16, 2000, and incorporate the Memorandum herein by reference as it accurately describes my conversations and observations during that time period.

I declare, under penalty of perjury that the foregoing is true and correct.

Executed on January 9, 2002, at Alhambra, California.

/s/ Michael Grosbard
MICHAEL GROSBARD

MEMORANDUM

TO: George Knoke, Bureau Director

FROM: Michael Grosbard, Deputy D. A.

RE: Grievance of Richard Ceballos

DATE: September 16, 2000

In March, 2000, Richard Ceballos asked to meet with me to discuss a problem he was having with Assistant Head Deputy Carol Najera. At our meeting, Ceballos told me about the case of *People v. Cuskey,* and a memorandum he had written in regard to the search warrant in that case. This was the first I heard of that case and the possible fabrication of probable cause in the search warrant affidavit.

At our meeting, Ceballos requested advice as to Najera's request that he rewrite his memorandum before it was turned over to the defense attorneys in that case. I told Ceballos that the proper way to proceed in such a situation is to redact, by blacking out, those parts of the memorandum that we believed the defense was not entitled to. By proceeding in this manner, rather than rewriting the memorandum, the defense is not mislead into thinking they have the entire memorandum, and they can make the appropriate motions to get the redacted part of the memorandum, which can he presented to the judge *in camera* for review. Najera should have been aware of this procedure, particularly as it was an issue in *People v. Menendez*, a case that Najera assisted in prosecuting.

Ceballos further briefed me on the entire case and the actions he took. It was clear that Mr. Ceballos was attempting to discharge his duty in a diligent and ethical manner. Ceballos went to the scene to personally investigate whether the affiant's assertions were possible. Ceballos called the affiant to discuss the affidavit, and the affiant stated he made a mistake in the affidavit with regard to the questioned assertions. The affidavit sought permission to search Cuskey's property for stolen car parts, yet a narcotics sniffing canine was employed in the search, and the only thing found was narcotics. Ceballos then wrote the memorandum explaining why he thought the case should be dismissed. Afterwards, Ceballos learned that one of the involved deputies had been sued by Cuskey, a key fact that had been omitted from the affidavit.

I personally reviewed the affidavit and the additional information that Ceballos had obtained, and I also concluded that there were obvious material misrepresentations and omissions, per *Franks v. Delaware*.

Ceballos also informed me of the meeting held in Head Deputy Frank Sundstedt's office, where the deputies and their superiors berated Ceballos, and Sundstedt's failure to intervene. Finally, Ceballos informed me that the deputies' superiors expressed their concern that a law suit might be filed against their department if the case was dismissed.

After this meeting, Ceballos kept me informed of what transpired in the *Cuskey* case. Ceballos told me that he was called as a defense witness, and that Najera treated him in a very aggressive and hostile manner during cross-examination. Ceballos told me shortly after the hearing that Najera was furious with him both before and after his testifying, and told him that he should just "shut up."

This treatment did not end with Ceballos' testimony. In early April, 2000, Ceballos and I were assigned as co-calendar deputies for one of the two master calendar courts that were beginning in Pomona. While Ceballos was doing the calendar with me, I assigned a case, *People v. Wu, Modasia, et al.*, to one of our low level trial deputies, Steve Gallon. Gallon complained to Najera that he did not want to handle the case, and thought we should give the defendants a more lenient disposition. Najera contacted Ceballos, who was familiar with the case. Ceballos disagreed in disposing of the case for less than it was worth. Najera then assigned the case to Ceballos to try without discussing this with me. (It should be noted that this case was ultimately dismissed after defense counsel and the investigating officer were indicted by federal authorities for extorting defendants in this and other similar cases. The federal authorities had suspicions that deputy district attorneys might be involved in these scams, due to the lenient dispositions the defendants had been receiving.)

I went to talk to Najera about this situation, and, for no apparent reason, she repeatedly criticized Ceballos as not being a good lawyer or calendar deputy. I repeatedly told Najera that Ceballos was an excellent calendar deputy, and that a large part of our success in doing the master calendar court was due to Ceballos' experience and the fact that defense counsel trusted Ceballos and considered him fair and reasonable as a result of his handling his own calendar court in Pomona for a significant period of time. Najera not only would not acknowledge that Ceballos was doing a good job, she would not stop making critical comments about Ceballos, although she had no specific comments to make about his handling of any particular cases.

Shortly after this conversation, Najera's negative attitude toward Ceballos was readily apparent in her daily interaction with him. She would ignore him in the hallways, giving him the silent treatment. Eventually, Head Deputy Frank Sundstedt began displaying the same attitude towards Ceballos as Najera, and he also would not speak to Ceballos unless absolutely necessary.

To my knowledge, there was not any source of friction between Najera and Sundstedt and Mr. Ceballos other than the stance that Ceballos took in the *Cuskey* case.

EXHIBIT 2

DECLARATION OF
DEPUTY DISTRICT ATTORNEY TERRY L. WHITE

1. I, TERRY L. WHITE, declare under penalty of perjury that I am an attorney duly licensed to practice law in the State of California, and that I am currently employed as

deputy district attorney for the Los Angeles County, District Attorney's office. I have personal knowledge of all facts stated herein, and if I were called as witness to testify I would and could competently testify thereto.

2. In September of the year 2000 I was the acting supervisor of deputy district attorney, Richard Ceballos, when he was assigned to work for me as a filing deputy in the Rio Hondo Municipal Court, located in El Monte, California. In that year I had one part time filing deputy and one full time filing deputy working before Richard Ceballos joined me.

3. Prior to Mr. Ceballos joining me as a filing deputy I never complained or ever made any formal or informal requests to Frank Sundstedt, Carol Najera, or any other supervising district attorney, that the District Attorney's office in the Rio Hondo courthouse had a need for two full time filing deputies. In fact, I was satisfied with having one full time filing deputy and one part time filing deputy, as these were adequate attorney resources for the District Attorney's office to meet the demands of this branch court.

Dated: 1-10-02

/s/ Terry L. White
Terry L. White
Declarant

EXHIBIT 3

DECLARATION OF JAIME HERNANDEZ

I, JAIME HERNANDEZ, state and declare as follows:

1. I am an attorney duly licensed to practice law in the State of California. I am a Deputy District Attorney employed by the County of Los Angeles.

2. If called upon to testify, I could competently testify to the matters stated herein of my own personal knowledge.

3. I am currently assigned to the District Attorney's office in the Rio Hondo Superior Court. I have been so assigned since approximately late 1999, and have been a filing deputy since that date. A filing Deputy District Attorney receives the police reports from police and thereafter determines the type of criminal charges to be filed in any particular case; and in some cases determines that no criminal charges be filed.

4. Since approximately the latter part of the year 1999, I was a full time filing deputy for the District Attorney's office in the Rio Hondo Superior Court. In addition, we had at Rio Hondo a job share/part time filing deputy for the District Attorney's office, Ms. Debra Scott. Ms. Scott worked one week on Mondays and Tuesdays and the following week Mondays, Tuesdays, and Wednesdays alternating the work schedule each week.

5. In the year 2000, with one full time filing Deputy, assisted by a part time filing Deputy, we were able to handle the case load at the Rio Hondo District Attorney's Office. This is because most of the heavy caseload of criminal filings occurs on Mondays, Tuesdays, and Wednesdays, following the weekend arrests which are sometimes numerous.

6. I never requested a second full time filing deputy for Rio Hondo from the Deputy District Attorney in charge at the El Monte office, Mr. Terry White, as I was satisfied with the help Ms. Scott provided to us on her job share/part time schedule.

7. I never requested a second full time filing deputy for Rio Hondo from Mr. Frank Sunstedt, the Deputy District Attorney in charge at the Pomona office. The Rio Hondo office came within the jurisdiction of the Pomona District Attorney's office and both are within the East District of the Los Angeles County.

8. In approximately September, 2000, Richard Ceballos was transferred to the Rio Hondo office as a full time filing deputy and Ms. Debra Scott was transferred to the Pomona office. In April, 2001, Richard Ceballos was transferred downtown to the Public Integrity Unit and Ms. Debra Scott was re-assigned part time to Rio Hondo.

I declare, under penalty of perjury that the foregoing is true and correct.

Executed on January 9, 2002, at El Monte, California.

/s/ Jamie Hernandez
JAMIE HERNANDEZ

EXHIBIT 6

CERTIFIED COPY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, Individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually, and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 through 10, Inclusive, Defendants.	No. CV 00-11106 (AHM) (AJWx)

DEPOSITION OF CAROL NAJERA

Thursday, September 20, 2001

* * *

[126] statement that Detective Walls gave to him, he had to memorialize, to do a witness statement report, and if he had his original documents, you know, his original notes, to put them on there.

Well, he thought about it a minute, and then he told me, "You know, I've got it. I already memorialized. It's on the memorandum." And I quite frankly forgot they were on there. I was looking at them, and I said "Okay." I said, "You know, Richard, I don't think we can turn these things over like this because we are going to get sued." And we

were kind of debating that issue, and a light bulb went on, and he's like, "Okay. What I will do is redact."

And I was like, "Okay. Well, before you even do that" – because I was still kind of leaning towards "Do witness statements." I figured "Wait a while. Let me talk to some people."

And Frank was not there at the time. And I thought I would wait until Frank got there and I'll ask him and see what he wants to do. And I know that in the course of that day – this happened in the afternoon – I talked to a few people, and the general feeling was that if you redact an internal – I was more concerned, obviously, than anyone else that we shouldn't be turning over internal D.A.

[127] documents, but the feeling that everybody left me was "That's fine. Just redact it and do it."

So I told Richard, and I think he asked a few people, too, and the general feeling among everybody was "Redact and do it," which was what, you know, after I voiced the concern, he was, like, "Yeah. Let's do it."

BY MR. BECERRA:

Q. Without telling me anything that your lawyer or lawyers have told you, probably in the – maybe in the grievance hearing, did you hear that Mr. Ceballos accused you of ordering him to actually rewrite the memos in such a way to leave out certain information and that the redaction was not acceptable to you?

Have you heard that allegation?

A. Yes.

Q. Is it your testimony that's not true? You never did that?

A. I never told him to rewrite this memo. I said "Write up witness statements."

And he kept saying "I am not going to rewrite my memo."

And I was, like, "You are not listening to me, Richard. I'm saying write all the witness statements with all the witnesses in it." And that's [128] when we were, like, "Okay." That's when he was, like, "I can redact it so we don't get sued by the police officers."

Q. So when you had mentioned earlier in your testimony, you said, "Look. If we rewrite the way that this is written" –

A. We didn't say "Rewrite this."

Q. I apologize. When you talked about – and you are right.

When you talked – when you testified about when you had mentioned turning over these internal documents that –

(At this time Mr. Guizar entered the conference room.)

MR. BECERRA: This is Mr. Guizar, He's also attorney of record. Anybody else?

BY MR. BECERRA:

Q. The concern that you had about being sued was with regards to the officers and not the defendants?

A. Correct. I thought that he had what could be characterized as slanderous statements in this thing, and I got the impression that he had some concerns, too, because he also was – like, when I said that, he said "Maybe I can redact it."

* * *

EXHIBIT 7

CERTIFIED COPY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, Individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually, and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 through 10, Inclusive, Defendants.	) No. CV 00-11106 (AHM) (AJWx)

DEPOSITION OF GILBERT GARCETTI

Tuesday, October 16, 2001

* * *

[30] essence, carry the flag for those he believes deserve a promotion. If he knows that everyone of his supervisors has, say, five people, he knows not everyone can get a promotion. So who are the one or two or three or four or five, six who deserve the promotion?

Q. From each particular office?

A. Right.

Q. Okay. Now, to your knowledge, are there notes or records that are kept, say, between the director and the district attorney in charge of an individual office as to how that list of eligibles is, say, prioritized or anything at all like that?

A. I'm not aware of any, anything written.

Q. All right. So although one could be eligible to be promoted, it sounds like, to me, they would still need their deputy in charge to prioritize them in order to have a shot at being promoted to a grade 4.

A. Yes and no. I mean, that's the most important thing, but that person may have just come, to Pasadena, for example, has only been there for three months; so maybe there's another supervisor who has greater input or a different director who supervised that person.

[31] So when they come together now, all the directors, assistant D.A.'s come together, that's when information is shared again. "Well, this person worked for me. He may be working for you now, but he was fabulous when he worked for us."

Q. Okay. Now, it sounds like, to me, that, by the time you get involved in the process of actually personally

ratifying who in 2000 is going to become a grade 4 from a grade 3, you actually have a – pretty much a reduced list. You've got a list –

A. I have a list of 40 recommendations. It's not 42, and I can knock off 1 or 2.

Q. Okay.

A. This is it.

Q. Okay. But it sounds like, to me, that you actually go through each of the people, and do you review something, or is this a conversation where you expect other people to have reviewed it and be able to answer questions or –

A. It's a conversation I have with the chief deputy. And I will go down, and many of the people I know. I've worked with them. Some of the people don't know, or maybe someone isn't on the list because I will then look at the master list and go down the master list too. "Well, why isn't this [32] person on this list?"

Q. Okay. So do you have a recollection whether in 2000 you did that, you looked at the master list and saw some folks that you thought maybe belonged on that list?

A. Well, there you asked two questions.

Q. I'm sorry.

A. One, yes, I did look at the list, I'm sure. Two, do I recall saying that there's some people who belong on that list? No, I don't recall.

Q. Okay. Now, would it be a fair statement – well, let me back up for a second first.

Are you aware of where the particular assignment is when that honed down list gets to you? Are you aware of where those grade 3 deputies are at the time you're looking at the list? Does that make sense?

A. Yeah, it makes sense. I may not be aware, but I'll ask the chief deputy.

Q. Okay. Now, just from being around for 29 years, I understand that you and Mr. Sunstedt have a good relationship.

A. Yes.

Q. Okay. And you've worked together – well, let me ask you. Let's include your time in the – [33] as the head of the district attorney's office. How many years actually have you been with the district attorney's office?

A. I was 32 years in the D.A.'s office.

Q. Okay. And out of that 32 years – you can give me a range. How much time do you think you actually spent working closely with Mr. Sunstedt?

A. "Closely"?

Q. I can use a better term. Where you had –

A. Well, I was his supervisor in the special investigations division, and that was – I don't know how many years that was. That's easy to document. My guess is three, four years.

Q. Okay.

A. And then we went our separate ways in terms of assignments, and when I became D.A., he worked with me very closely for four years.

Q. And he made the request – after you were re-elected a second time to be the head of the district attorney's office, he made a request that he wanted to go out to Pomona for what I imagine was personal reasons, and you OK'd that?

A. Yes.

Q. All right. Would it be a fair statement that recommendations from him in terms of

* * *

EXHIBIT 8

CERTIFIED COPY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, Individually, and in his Official Capacity, FRANK SUNDSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually, and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 through 10, Inclusive, Defendants.	No. CV 00-11106 (AHM) (AJWx)

DEPOSITION OF DINKO BOZANICH

Friday, October 5, 2001

* * *

[142] failing to comply with this Brady obligation dealing with the Cuskey matter?

A. He had already demonstrated time and again. By the time that Richard Ceballos's situation came up, the office was not going to fully honor the Brady obligation by notifying the defense attorneys of defendants who[se] cases were already closed because it had become routine, and his – all of his administrators, particularly those at will, that's the way they functioned. And I'll give you a perfect example.

Q. Hold on. I'll let you talk after, you know, maybe Mr. Becerra wants to redirect you. I think we're kind of at the end. I just want to wrap it up. I just want to know if you have any evidence or facts that may support, if you are asserting your assertion that Mr. Garcetti was aware that in the Cuskey matter – that Brady material was not – or Brady obligation was not being complied with by the district attorney's office.

A. Compelling circumstantial evidence, overwhelming circumstantial evidence in cases that I've personally been involved with and many that I'm aware of that Garcetti had previously not taken steps to assure that the defense bar was properly advised [143] pursuant to Brady. So when this case came along, it was just another one in a long series of cases where there had already been decisions made that we would not notify the defense bar.

So does that mean that every case in which we didn't do it was then brought to Garcetti's attention? No. But he

had already, clearly and unequivocally conducted himself, and made it clear to his subordinate and approached what his subordinates had done time and again. So when this case came along, it was just another one in which we were flagrantly and deliberately violating the Brady obligation.

Q. I don't want to put words in your mouth, so correct me if you don't think it is accurate.

You are assuming that Mr. Garcetti was aware of the D.A.'s office failure to comply with the Brady obligation in this Cuskey matter because of your past experiences with him on other cases?

MR. BECERRA: Well, I'm going to object to the characterization, and I think it misstates his testimony. He can answer it if he can answer it.

MS. LEE: He's an attorney. Let him respond.

THE WITNESS: Not just my past personal [144] experiences, but some of which I've already touched on today. But the way things are done in the D.A.'s office under Garcetti with regard to this obligation, including when I had raised issues with regarding to Brady and how they had been absolutely avoided, ignored, hidden, submerged, because I sent letters to him, copies to him. I never got an answer from anybody in the administration. Even when I persisted and kept asking questions, it was in stuff that was of a public nature. The least that could have been done is, "Bozanich, you don't know what you're talking about," or, "We've looked into it. You're wrong. You're right. You have to look at it further." Nothing. You ran into a black hole and that's just one example I can give you.

Another would be in the Rampart, if he wants to follow up on it. The perfect example I gave you a moment ago. There is no doubt in my mind that Garcetti absolutely knew that he violated his Brady obligation when this came to Rafael Perez. And if you want an answer, I'll give it to you.

BY MS. LEE:

Q. That's fine. I'm talking about Cuskey. Do you have any personal information?

A. That proceeded.

[145] Q. I mean, you weren't personally involved in Cuskey?

A. That's correct.

Q. It's fine to say you have an opinion based upon these prior experiences, and that's why you are assuming that Garcetti, you know, knew about it, but –

MR. BECERRA: Let me object –

MS. LEE: I just want to –

THE WITNESS: That's not an opinion. That's an inference I draw from all the available evidence, and then it's an unequivocal inference provable beyond a reasonable doubt with 12 in the box.

MR. BECERRA: Okay. In your opinion; correct?

THE WITNESS: No, not opinion. I have tried circumstantial evidence cases time and time again. Even when a defendant gets up there and says, "It ain't true," the trouble is that compelling circumstantial evidence is such. And that's what I'm trying to tell you, that in cases I

know Garcetti was personally aware of in which he did not take the action that is required. And when his subordinates also did not, the tempo was set by the district attorney. The district attorney knew what was going

* * *

[148] here knows that, and Garcetti does too.

Q. Let me ask it this way.

Do you think Mr. Garcetti participated in removing Mr. Ceballos from the calendar deputy position?

MR. BECERRA: I think that's been asked and answered, and I'm going to object as being vague and ambiguous as to "participated."

MS. LEE: Just answer "yes" or "no" if you understand it. If you don't, then we'll move on.

MR. BECERRA: It's still vague and ambiguous.

THE WITNESS: I will define it by Garcetti, as a master, being able to wipe his hands, and in effect, saying, "It wasn't my deal."

Was he involved in terms of previously setting the tone for how to do it and training Sundstedt? He's responsible.

BY MS. LEE:

Q. Is it your understanding that Mr. Garcetti participated in not – well, strike that.

Was it your understanding that Mr. Garcetti participated in removing the – that one murder case away from Mr. Ceballos?

A. I would have to give you the same answer.

* * *

EXHIBIT 9

DECLARATION OF JAMES E. BLANCARTE

I, James E. Blancarte, declare that I am an attorney duly licensed to practice law within all courts in the State of California. I am the immediate past President of the Mexican American Bar Association ("MABA").

I have personal knowledge of all facts stated in this declaration, and if called as a witness I could and would testify competently thereto.

In the fall of the year 2000 Deputy District Attorney, Richard Ceballos asked if he could address the MABA board regarding his allegation of retaliation by his supervisors from the District Attorney's Pomona Branch Office for having disclosed alleged misconduct of some Los Angeles County Sheriff Deputies.

In my capacity as MABA President, I called Los Angeles County District Attorney, Gil Garcetti and spoke to him about MABA's concerns regarding possible retaliation against Mr. Ceballos. I do not recall the exact words used by Mr. Garcetti in response. However, it is my best recollection that he said he would take note of MABA's concerns regarding Mr. Ceballos' situation. I then informed the MABA Board and Mr. Ceballos of the aforementioned communication. Neither I, nor the MABA Board took any further action with respect to Mr. Ceballos' allegations. I had no further communication of any kind with D.A. Garcetti regarding Mr. Ceballos' concerns or allegations.

I did not send any e-mails, memorandums, or written communications to Mr. Garcetti with respect to the above referenced communication I had with him regarding Richard Ceballos nor did I receive any such written communication or other documents from D.A. Garcetti.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 27th day of November 2001

/s/ James E. Blancarte
JAMES E. BLANCARTE

[Proof Of Service Omitted In Printing]

DANILO J. BECERRA, ESQ, SBN, 56526
MORENO, BECERRA, GUERRERO & CASILLAS
A Professional Law Corporation
3500 West Beverly Boulevard
Montebello, CA 90640-1541
Telephone No. (323) 725-0917
Facsimile No. (323) 725-0350

HUMBERTO GUIZAR, ESQ. – SBN – 125769
LUIS A. CARRILLO, ESQ. – SBN 70398
Attorneys at Law
3500 W. Beverly Boulevard
Montebello, CA 90640-1541
Telephone: (323) 725-1151
Facsimile: (323) 725-0350

Attorneys for RICHARD CEBALLOS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs GIL GARCETTI, individually, and in his Official Capacity, FRANK SUNSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive, Defendants.	Case No. CV 00-11106 AHM (AJWx) **ERRATA TO PLAINTIFF'S STATEMENT IN OPPOSITION TO DEFENDANTS' SEPARATE STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW** Date: January 28, 2002 Time: 10:00 a.m. Place: Courtroom 14

Plaintiff RICHARD CEBALLOS submits this Errata to Plaintiff's Statement of Uncontroverted Facts of Law in Opposition to the Motion for Summary Judgment herein filed by Defendants, GIL GARCETTI, FRANK SUNSTEDT and CAROL NAJERA. Specifically, Plaintiff left out his Response to Defendants' Conclusions of Law *at page 34* following the disputed statement of facts. Attached for the court's convenience is the corrected statement of facts as set forth herein, which includes the Response to Defendants' Conclusions of Law which was inadvertently omitted during the word processing of Plaintiff's Statement in Opposition to Defendants' Separate Statement of Uncontroverted Facts and Conclusions of Law:

Defendant's Uncontroverted Facts	**Plaintiffs' Facts and Supporting Evidence**
1. Plaintiff has been employed as a Deputy District Attorney with the Los Angeles County District Attorney's Office since 1989.	1. Undisputed, with the following caveat: Plaintiff had worked in the district attorney's office for 12 years prior to the incidents which precipitated this lawsuit. In calendar year 1996 plaintiff was promoted from Grade II to Grade III. From calendar years 1997 to 2000 plaintiff was a calendar deputy. Prior to his assignments as a filing deputy by defendants Sunstedt and Najera plaintiff never worked as a filing deputy as a grade III.

The only time plaintiff had ever worked as a Grade II was when he was doing special "vertical prosecutions", in sex crimes, which means the deputy D.A.'s handle the case from its filing to trial.

EVIDENTIARY SUPPORT

See, Exhibit (1) Ceballos Depo., at 13:12-17, 15:14-22, 17:15-19, 23:4-17, 27:6-15, 32:10-20

2. While Plaintiff was assigned as the calendar deputy at the Pomona branch, plaintiff was approached by a criminal defense attorney, Richard Escobedo, who represented one of the defendants in the case of *People v. Cuskey*, which had been assigned to another deputy District Attorney.	2. Undisputed
3. Mr. Escobedo told plaintiff that he believed that arresting Sheriff's deputies from the Industry Station may have lied in the search warrant affidavit and requested that plaintiff review the case.	3. Undisputed.

4. Plaintiff apparently reviewed the affidavit and other documentary evidence, and concluded that the property described in the affidavit had been mischaracterized.

4. **DISPUTED:**

Plaintiff reviewed the affidavit and other documentary evidence, he then determined he should personally inspect the scene which formed the basis for the Sheriff's warrant. After doing these aforementioned things he determined that the sheriff's had either lied or grossly misrepresented the truth. Thereafter, pursuant to his duties as a prosecutor, he wrote a memo expressing his concerns about the veracity of the officers in this case. He then informed his supervisors he intended to comply with his duties under *Brady v. Maryland*, (1963) 373 U.S. 83, 83 S.Ct. 1194, 102 L.Ed.2d 215., which required him to turn his memo over to defense counsel.

Defendant NAJERA in violation of *Brady* ordered Plaintiff to not produce this memo to defense counsel, but rather, ordered him to rewrite a different memo, and also threatened plaintiff with employment retaliation if he did not do as told.

Defendant NAJERA admits that she did not want Plaintiff's original memo produced. However, she states she asked Plaintiff to write out a witness statement instead.

EVIDENTIARY SUPPORT

See, Exhibit (1) Ceballos Depo at 44:13-16, 69:7, 74:17, 120:21-122:4, 124:2-25, 125:1-25, Exhibit (6) depo of Carol Najera, at 126:1-15, 127:9-25, 128:1-25

5. After further investigation, plaintiff discussed the matter with Head Deputy District Attorney Frank Sunstedt and plaintiff's immediate supervisor Carol Najera who purportedly agreed that there was a problem.

5. Undisputed

6. On March 2, 2000, plaintiff prepared a memorandum/ disposition report setting forth a summary of his investigation and his conclusion that the affidavit was falsified and misleading and his recommendation that the *Cuskey* case dismissed and sent the memorandum/ disposition report to defendant Sunstedt.

6. Undisputed

7. Upon reviewing the memorandum, defendant Sunstedt had concerns about the *Cuskey* case but recommended that plaintiff revise the memorandum so that it did not include conclusions and blatant statements accusing the Sheriff deputies of committing felonious perjuries that had not been proven.

7. **DISPUTED:**

Defendant SUNSTEDT, as was defendant NAJERA were concerned about the Sheriff's Department's reaction to the report and therefore instructed Plaintiff to edit the language of the report to not make it so "accusatory".

Defendant NAJERA, did not want Plaintiff's original memo produced to the defense attorney. In fact she agrees she ordered Plaintiff to write out a witness statement instead of producing Plaintiff's actual memorandum. She also threatened plaintiff with employment retaliation if he did not do as he was told.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 90:21-24, 124:2-25, 125:1-25, Exhibit (6) depo of Carol Najera, at 88:11-17, 126:1-15, 127:9-25,

8. After the memorandum was modified, defendant Sunstedt contacted the appropriate Captain at the

8. **DISPUTED:**

This meeting was actually held at the direction

Sheriff's Department Industry Station and advised him that he thought there was problem with the *Cuskey* case and requested a meeting to discuss it.

of Defendant SUNSTEDT in response to a demand by the Sheriff's Department.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 56:1.

9. On March 9, 2000, a meeting was held at Mr. Sunstedt's office attended by a Sheriff's captain, lieutenant, the deputy sheriff who prepared the search warrant affidavit, the plaintiff, Mr. Gallon, and defendants Sunstedt and Najera.

9. Undisputed, except with the following necessary addendum;

There were other Sheriff deputies present, including a Captain.

EVIDENTIARY SUPPORT

See Exhibit (5) depo of Frank Sunstedt, at 105:10-17

10. Upon listening to what the deputy sheriff who prepared the search warrant affidavit had to say at the meeting, Mr. Sunstedt was not sure that a dismissal without an airing of the evidence was the appropriate was to handle the *Cuskey* case, but rather, he believed that the best course of action was to proceed with the Motion to Traverse the warrant which had already been filed by the defense so that a neutral judicial officer could hear the testimonies

10. **DISPUTED.**

Defendant SUNSTEDT, only considered the Sheriff's Department's reaction, primarily their fears they could be sued by the criminal defendants if the matter did not proceed to trial.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 90:21-24, 124:2-25, 125:1-25

and assess the evidence and make the call regarding the credibility of the officers.

11. Plaintiff did not continue to try to have the *Cuskey* case dismissed after the March 9, 2000 meeting.

11. **DISPUTED**

Plaintiff repeatedly opined that the Cuskey case should be dismissed and requested it. He also later learned that the same deputies in the Cuskey case were involved a subsequent case where similar allegations were being made. He tried to once again comply with *Brady v. Maryland*, (1963) 373 U.S. 83, 83 S.Ct. 1194, 102 L.Ed.2d 215., by trying to disclose what he knew in the Cuskey case, but he was again threatened, this time by Deputy district attorney George Knoke.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 249:1-25, 250:1-25

12. Plaintiff was subpoenaed by the defense in the *Cuskey* case to testify [a]t the Motion to Traverse hearing which was to be heard by Judge David Milton.

12. Undisputed

13. Plaintiff was the calendar deputy for Judge Milton at that time and had been so for about one year.

13. Undisputed

14. Plaintiff testified at the Motion to Traverse hearing, and the Motion was denied.

14. Undisputed

15. One of the defendants was convicted after trial and the other two defendants entered guilty pleas.

15. Undisputed except with the following necessary addendum:

As a result of the allegations raised by Plaintiff, one of the defendants bargained to a lesser charge.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 134:13-18

16. Plaintiff contends that his opinions regarding the handling of the *Cuskey* matter led to various acts of retaliation by defendants Sunstedt and Najera

16. DISPUTED

The Plaintiff was subjected to retaliation solely for voicing his opinions, and for a number of other factors; including; speaking out against Sheriff misconduct, writing the memorandum setting forth the misconduct, for refusing to withdraw his position on the issue, (which included his relentless will to do right, by taking steps to dismiss the case) and for, objecting to defendants, Sunstedt and

Najera allowing the Sheriff deputies at the March 9, 2000 meeting to degrade, castigate, and embarrass Plaintiff for having reported.

Additionally, after the March 9, 2000 meeting the defendants, Sunstedt and Najera were both avoiding, shunning and unjustifiably criticizing plaintiff. This retaliation subjected plaintiff to a hostile work environment.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 90:21-24, 97:18-24, 98:18-23, 124:2-25, 125:1-25, Exhibit (6) depo of Carol Najera, at 126:1-15, 127:9-25, 128:1-25

17. Plaintiff alleges the first instance of retaliation as a result of his statements and opinions relating to the *Cuskey* matter purportedly occurred right after the meeting with the Sheriff's officials when defendants Sunstedt allegedly told plaintiff that he would no longer be calendar deputy at the Pomona branch and

17. DISPUTED

Although plaintiff perceived this as the first instance of retaliation for his statements and opinions relating to the *Cuskey* matter, there were other prior acts of retaliation for Plaintiff refusing to condone the Sheriff misconduct. Specifically, after Plaintiff wrote the memorandum

would be re-assigned as a trial deputy.

defendants, Sunstedt and Najera allowed the Sheriff deputies at the March 9, 2000 meeting to degrade, castigate, and embarrass Plaintiff for reporting for the misconduct.

Additionally, after the March 9, 2000 meeting the defendants, Sunstedt and Najera were both avoiding, shunning and unjustifiably criticizing plaintiff. This retaliation subjected plaintiff to a hostile work environment.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 90:21-24, 124:2-25, 125:1-25, Exhibit (6) depo of Carol Najera, at 126:1-15, 127:9-25, 128:1-25

18. Plaintiff alleges the second instance of retaliation as a result of his statements and opinions relating to the *Cuskey* matter allegedly occurred when defendants Najera informed him that one of his murder cases would be reassigned to a lower deputy District Attorney.

18. Undisputed except with that the following necessary addendum:

No other Grade III level Deputy District attorney EVER had a murder case pulled from him while plaintiff was working in the Pomona Branch court.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 143:-19

19. Plaintiff also contends that he was not assigned any new murder cases and was denied a Grade IV promotion as a result of his opinions relating to the *Cuskey* case.

19. DISPUTED

Plaintiff was denied a Grade IV promotion because of his opinions related to the *Cuskey* case. Defendants Sunstedt and Najera carried out administrative actions specifically for the purpose of directly affecting Plaintiff's ability to be promoted.

These actions included: the removal of plaintiff as a calendar deputy, not allowing plaintiff to handle any further murder cases, and their attempts to transfer the highly experienced Plaintiff to the degrading job of filing misdemeanors.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 27:6-25, 27:1-9, 32:8-20, 33:17-33, 37:2-4, 38:5-19, 40:14-22, 141:12-25, 142:1-17, 143:1-12, 146:11-25, 147:1-25, Exhibit (7) depo of Gilbert Garcetti, at 30:9-25, 31:1-25, 32:1-25, 33;1-25

20. In April 2000, the Pomona branch eliminated two calendar courts. Prior to then, it had four calendar courts, two of which were staffed by Grade IV calendar deputies, and two of which were staffed by Grade Level III deputies.

20. **DISPUTED**

Prior to April 2000 The Pomona branch court had four calendar courts. In April 2000 two of the calendar court[s] were not eliminated, but rather, the four calendar courts were consolidated into two calendar courts, consequently two calendar deputies were assigned for the two consolidated calendar courts.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 140:7-25, 141:1-11

21. Mr. Sunstedt decided that the two remaining calendar courts should have two calendar deputies and plaintiff was thereafter placed as a co-calendar deputy with a Grade IV deputy, Michael Grossbard.

21. **DISPUTED**

Prior to April 2000 The Pomona branch court had four calendar courts. In April 2000 two of the calendar court[s] were not eliminated, but rather, the four calendar courts were consolidated into two calendar courts, consequently two calendar deputies were assigned for the two consolidated calendar courts. The fact remained that two calendar deputies were required for the two consolidated courts. Plaintiff

was one of those calendar deputies until May 2000, when he was stripped of that position and transferred to the status of trial attorney.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 140:7-25, 141:1-11

22. Because filing deputy positions were generally difficult to staff, Mr. Sunstedt attempted to rotate deputies through these positions for six-month periods. One of the Grade III deputies had been filling one filing deputy position and it was understood even before the *Cuskey* matter that plaintiff was the next in line to file for a six-month period.

22. **DISPUTED**

There is no such thing as a rotation policy regarding filing deputies, but rather, plaintiff was the only calendar deputy from the Pomona branch court that was ever sent out to a different area court to work as a filing deputy during the 2-3 year time period under Sunstedt's leadership reign. In fact, of the current filing deputies working in the area courts that serve the Pomona branch court none have ever worked as calendar deputies.

This administrative action is another example of retaliatory actions defendants took against plaintiff in order to affect his chances of being promoted.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 27:6-25, 27:1-9, 32:8-20, 33:17-33, 37:2-4, 38:5-19, 40:14-22, 141:12-25, 142:1-17, 143:1-12, 146:11-25, 147:1-25, Exhibit (7) depo of Gilbert Garcetti, at 30:9-25, 31:1-25, 32:1-25, 33:1-25

23. However, when it came time for plaintiff to fill that filing deputy positions, Mr. Sunstedt became aware of a trial deputy whose pregnancy prevented her continuing to do court duty. As such, she was assigned the filing position, giving plaintiff a reprieve until mid-August, 2000, when the misdemeanor filings in Pomona were getting behind because there was only a part-time deputy handling them.

23. **DISPUTED**

Defendants Sunstedt and Najera took this administrative action, along with the others mentioned above, for the purpose of directly affecting Plaintiff's ability to be promoted. In fact, deputy district attorneys' Terry L. White, and Jaime Hernandez, (assigned to Rio Hondo when plaintiff was transferred) did not request nor they need a full time filing deputy. Therefore, there was no need for plaintiff to be assigned to work full time as a filing deputy in Rio Hondo.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 27:6-25, 27:1-9, 32:8-20, 33:17-33, 37:2-4, 38:5-19, 40:14-22,

141:12-25, 142:1-17, 143:1-12, 146:11-25, 147:1-25, Exhibit (7) depo of Gilbert Garcetti, at 30:9-25, 31:1-25, 32:1-25, 33:1-25

24. The fact plaintiff got transferred to be a filing deputy is because he was treated identical with every other Grade III that Mr. Sunstedt had on staff.

24. **DISPUTED**

Plaintiff was treated differently f[ro]m other deputy D.A.'s because of his actions in the *Cuskey* case, as there was no need for plaintiff to be assigned to work full time as a filing deputy in Rio Hondo. Also, the transfer was done for the purpose of directly affecting Plaintiff's ability to be promoted.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 27:6-25, 27:1-9, 32:8-20, 33:17-33, 37:2-4, 38:5-19, 40:14-22, 141:12-25, 142:1-17, 143:1-12, 146:11-25, 147:1-25, See Exhibit (7) depo of Gilbert Garcetti, at 30:9-25, 31:1-25, 32:1-25, 33:1-25 Exhibit (2) Declaration of Terry L. White, Exhibit (3) Declaration of Jaime Hernandez

25. Because plaintiff lived in Pomona, Ms. Najera wanted to give plaintiff an option to remain in the Pomona branch and fill the misdemeanor filing vacancy. As such, on August 28, 2000, Ms. Najera gave plaintiff a choice of filing misdemeanors in Pomona, or being transferred to El Monte as a felony-filing deputy

25. **DISPUTED**

Najera created a false pretext to justify transferring plaintiff to the Rio Hondo court as filing deputy by falsely stating that the Rio Hondo Branch court needed a two full time filing deputies. In fact, deputy district attorneys' Terry L. White, and Jaime Hernandez, (assigned to Rio Hondo when plaintiff was transferred) did not request not need or request a full time filing deputy.

This transfer of plaintiff's employment duties status was intentional administrative action that placed stigmas on plaintiff's employment status in order to insure he would not be promoted to a Grade IV position.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 27:6-25, 27:1-9, 32:8-20, 33:17-33, 37:2-4, 38:5-19, 40:14-22, 141:12-25, 142:1-17, 143:1-12, 146:11-15, 147:1-25, (7) depo of Gilbert Garcetti, at 30:9-25, 31:1-25, 32:1-25,

33:1-25, Exhibit (2) Declaration of Terry L. White, Exhibit (3) Declaration of Jaime Hernandez

26. However, plaintiff refused to choose because he believed that filing misdemeanors was not suitable for one with his experience and that being transferred to El Monte would require a longer commute.

26. **DISPUTED**

Plaintiff refused to choose between the two choices given because both choices were degrading retaliatory acts. In fact, deputy district attorneys' Terry L. White, and Jaime Hernandez, (assigned to Rio Hondo when plaintiff was transferred) did not request not need or request a full time filing deputy.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 27:6-25, 27:1-9, 32:8-20, 33:17-33, 37:2-4, 38:5-19, 40:14-22, 141:12-25, 142:1-17, 143:1-12, 146:11-25, 147:1-25, Exhibit (2) Declaration of Terry L. White, Exhibit (3) Declaration of Jaime Hernandez

27. Since plaintiff did not choose, Ms. Najera transferred him to El Monte effective September 5, 2000

27. DISPUTED

Najera created a false pretext to justify transferring plaintiff to the Rio Hondo court as a filing

deputy by falsely stating that the Rio Hondo Branch court needed a two full time filing deputies. In fact, deputy district attorneys' Terry L. White, and Jaime Hernandez (assigned to Rio Hondo when plaintiff was transferred) did not request not need or request a full time filing deputy.

This transfer of plaintiff's status as a Deputy district attorney was a calculated administrative change carried out with the intent to chastise plaintiff, and place stigmas on plaintiff's employment status in order to insure he would not be promoted to a Grade IV position.

Plaintiff was the only calendar deputy from the Pomona branch court that was ever sent out to a different area court to work as a filing deputy during the 2-3 year time period under Sunstedt's leadership reign. In fact, of the current filing deputies working in the area courts that serve the Pomona branch court none have ever worked as calendar deputies.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 27:6-25, 27:1-9, 32:8-20, 33:17-33, 37:2-4, 38:5-19, 40:14-22, 43:12-20, 44:3-25, 45:5-1[illegible], 136:14-23, 141:12-25, 142:1-17, 143:1-12, 146:11-25, 147:1-25, 150:13-25, Exhibit (2) Declaration of Terry L. White, Exhibit (3) Declaration of Jaime Hernandez

28. As he was in charge of overseeing an entire branch office, Mr. Sunstedt fe[l]t it was his duty to ensure that his deputies were permitted to handle a homicide case at one point under his supervisor. Two Grade II deputies were to be transferred to the Juvenile Division from Pomona shortly and Mr. Sunstedt wanted them to experience the trial of a murder case before their departure to Juvenile.

28. DISPUTED:

Taking away the murder case from plaintiff was a retaliation for his actions in the *Cuskey* case. The employment action taken was a pretext specifically calculated and carried out to degrade, and chastise plaintiff, and, to place stigmas on plaintiff's employment in order to insure he would not be promoted to a Grade IV position.

This retaliatory employment action, as well as the others was ratified by Defendant, Gil Garcetti, as Garcetti was aware that plaintiff, a highly experienced deputy D.A. was

handling Grade II type work.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 27:6-25, 27:1-9, 32:8-20, 33:17-33, 37:2-4, 38:5-19, 40:14-22, 43:12-20, 44:3-25, 45:5-18, 136:15-23, 141:12-25, 142:1-17, 143:1-12, 146:11-25, 147:1-25, 150:13-25, Exhibit (8) depo of Dinko Bozanich, at 142:12-25, 143:1-25, 144:1-25, 145:10-25, 48:10-25.

29. He instructed Ms. Najera to find a suitable murder case for each of the Grade II deputies to try before their departure to Juvenile. Ms Najera went to all the calendar deputies and gathered a brief synopsis of all the pending murder cases that might be suitable for reassignment and brought them to the attention of Mr. Sunstedt.

29. DISPUTED

No other deputy district attorney Grade III from the Pomona branch had a murder case pulled from him as stated by defendants.

The employment action taken was a pretext specifically calculated and carried out to degrade, and chastise plaintiff, and, to place stigmas on plaintiff's employment in order to insure he would not be promoted to a Grade IV position

This retaliatory employment action along with

30. One of the murder cases selected by Mr. Sunstedt as being appropriate to be re-assigned to Grade II deputy Steve Gallon was plaintiff and the other Grade II received a murder case from another Grade III deputy.

the others was fully ratified by Defendant, Gil Garcetti.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 27:6-25, 27:1-9, 32:8-20, 33:17-33, 37:2-4, 38:5-19, 40:14-22, 43:12-20, 44:3-25, 45:5-18, 136:15-23, 141:12-25, 142:1-17, 143:1-12, 146:11-25, 147:1-25, 150:13-25, Exhibit (8) depo of Dinko Bozanich at 142:12-25, 143:1-25, 144:1-25, 145:10-25, 148:10-25.

30. DISPUTED

No other deputy district attorney Grade III from the Pomona branch had a murder case pulled from him as stated by defendants.

This retaliatory employment action along with the others was fully ratified by Defendant, Gil Garcetti.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 27:6-25, 27:1-9, 32:8-20, 33:17-33, 37:2-4, 38:5-19, 40:14-22, 43:12-20, 44:3-25, 45:5-18, 136:15-23, 141:12-25,

142:1-17, 143:1-12, 146:11-25, 147:1-25, 150:13-25, Exhibit (8) depo of Dinko Bozanich, at 142:12-25, 143:1-25, 144:1-25, 144:10-25, 148:10-25

31. Mr. Sunstedt chose the *Perrin* case, previously assigned to plaintiff, because he believed the nature of the case was suitable to provide a promising Grade II deputy with experience of trying a homicide case.

31. DISPUTED

No other deputy district attorney Grade III from the Pomona branch had a murder case pulled from him as was done to plaintiff.

The employment action taken was a pretext specifically calculated and carried out to degrade, and chastise plaintiff, and, to place stigmas on plaintiff's employment in order to insure he would not be promoted to a Grade IV position.

This retaliatory employment action along with the others was fully ratified by Defendant, Gil Garcetti.

EVIDENTIARY SUPPORT

See Exhibit (4) depo of Richard Ceballos, at 27:6-25, 27:1-9, 32:8-20, 33:17-33, 37:2-4, 38:5-19, 40:14-22, 43:12-20, 44:3-25, 45:5-18, 136:15-23, 141:12-25, 142:1-17, 143:1-12, 146:11-25, 147:1-25, 150:13-25

32. The number of new murder cases that would be assigned to trial deputies were dependent on the murder rate in Pomona.	32. Undisputed
33. Plaintiff was not assigned any new murder cases between the time of the hearing on the Motion to Traverse on the *Cuskey* case on March 20, 2000, and his re-assignment to El Monte to September 5, 2000 because there were limited murder informations filed in Pomona.	33. DISPUTED Sunstedt's transfer of Plaintiff to El Monte was a retaliatory employment action. Specifically the decision to not assign any further murder cases to plaintiff was done to castigate and chastise plaintiff for his reporting of sheriff misconduct, and to place stigmas on plaintiff's employment resume in order to prevent his being promoted to a Grade IV position. This retaliatory employment action along with the others was fully ratified by Defendant, Gil Garcetti. **EVIDENTIARY SUPPORT** See Exhibit (4) depo of Richard Ceballos, at 27:6-25, 27:1-9, 32:8-20, 33:17-33, 37:2-4, 38:5-19, 40:14-22, 43:12-20, 44:3-25, 45:5-18, 136:15-23, 141:12-25,

	142:1-17, 143:1-12, 146:11-25, 147:1-25, 150:13-25, Exhibit (8) depo of Dinko Bozanich at 142:12-25, 143:1-25, 144:1-25, 145:10-25, 148:10-25
34. Plaintiff along with about 150 others, was a candidate for limited Grade IV positions in the District Attorney's Office. Only 44 Grade IIIs were actually promoted.	34. Undisputed
35. Plaintiff was one of ten Grade III's from the Pomona branch that Mr. Sunstedt recommended to be promoted based upon his scores from the written exam and appraisal of promotability analysis	35. DISPUTED Only before the *Cuskey* matter did Ceballos have the opportunity to be promoted based upon his outstanding evaluations. Following *Cuskey* he would be denied the essential recommendation from defendant Sunstedt to obtain his Grade IV promotion. **EVIDENTIARY SUPPORT** *See*, Exhibit (8) depo of Dinko Bozanich, at 142:12-25, 143:1-25, 144:1-25, 145:10-25, 148:10-25, Exhibit (7) depo of Gilbert Garcetti, at 30:9-25, 31:1-25, 32:1-25, 33:1-25, Exhibit (4) depo of Richard Ceballos at 161:2-17; 162:24-25;

163:1-21; Exhibit (5) depo of Frank Sunstedt at 50:18-25; 51:1-2; 52:12-17

36. Of the candidates, Mr. Sunstedt rated eight outstanding, including plaintiff. Four of these eight candidates were actually promoted.

36. Undisputed, but with the additional fact that plaintiff was not recommended by defendant Sunstedt in the ultimate group of four that were the only candidates that had any possibility of being promoted to Grade IV.

EVIDENTIARY SUPPORT

See, Exhibit (8) depo of Dinko Bozanich, at 142:12-25, 143:1-25, 144:1-25, 145:10-25, 148:10-25, Exhibit (7) depo of Gilbert Garcetti, at 30:9-24, 31:1-25, 32:1-25, 33:1-25, Exhibit (4) depo of Richard Ceballos at 161:2-17; 162:24-25; 163:1-21, Exhibit (5) depo of Frank Sunstedt at 50:18-25; 51:1-2; 52:12-17

37. The final decision on which Grade III deputies would be promoted to Grade IV rested with then District Attorney Garcetti, who would receive recommendations from his Chief Deputy after the Chief Deputy has meetings and discussions with the

37. DISPUTED

Sun[d]stedt and Garcetti were personal friends and worked together. Garcetti placed a lot of weight on what Sundstedt would tell him regarding promotions. Ultimately without the recommendation of

Directors of all the branch offices and the three Assistant District Attorneys.

defendant Sun[d]stedt plaintiff would not have any opportunity to be promoted.

EVIDENTIARY SUPPORT

See, Exhibit (8) depo of Dinko Bozanich at 142:12-25, 143:1-25, 144:1-25, 145:10-25, 148:10-25. Exhibit (7) depo of Gilbert Garcetti, at 30:9-25, 31:1-25, 32:1-25, 33:1-25, Exhibit (4) depo of Richard Ceballos at 161:2-17; 162:24-25; 163:1-21, Exhibit (5) depo of Frank Sunstedt at 50:18-25; 51:1-2; 52:12-17

38. Other than scoring the appraisal of promotability, the only other involvement that Mr. Sunstedt had in the promotion process was to opine to the Director of the Branch and Area Operation of his top three or four candidates whom he believed should get the Grade IV position.

38. DISPUTED

Sun[d]stedt and Garcetti were personal friends and worked together. Garcetti placed a lot of weight on what Sunstedt would tell him.

Plaintiff knew that based on the relationship of Garcetti and Sunstedt that it was futile to utilize the grievance procedure for the retaliation that had occurred. Plaintiff went to the Mexican American Bar Association, and was assured by the President James Blancarte, that as a personal friend of Garcetti,

that he had spoken to him and that Garcetti would give the matter his personal attention and that there was no need to talk to the MABA Board of Trustees.

Within days of Mr. Blancarte's communication with Garcetti the grievance officer rejected all of Mr. Ceballos claims of retaliation.

As a result of the defendants' actions set forth in the grievance, plaintiff suffered severe emotional distress, lost his desire to continue his career as a prosecutor which required him to use medicine in order to sleep.

EVIDENTIARY SUPPORT

See, Exhibit (8) depo of Dinko Bozanich at 142:12-25, 143:1-25, 144:1-25, 145:10-25, 148:10-25, and, Exhibit (4) depo of Richard Ceballos, at 177:16-25, 178:2-23, 180:1-16, 186:12-23, 264:1-25, 262:2-25, 263:1-25, 265:1-23, 266:2-23, 270:2-8, 273:8-15, 275:15-23, 276:3-18

39. While Mr. Garcetti was the final decision-maker on who would be promoted to the limited Grade IV positions, there is simply no evidence that he was even aware of the *Cuskey* matter or plaintiff's involvement in the same at the time he agreed with the recommendations of his Chief Deputy on the Grade IV promotions or that his approval with the recommendations had anything to do with plaintiff's purported speech.

39. DISPUTED

Due to the explosiveness of the police misconduct issue, and the negative stigma it could place on the district attorney's office, as evidenced by the Rampart Scandal, it is highly unlikely that Sunstedt or the Sheriff's Department would not inform Gil Garcetti about the allegations made by plaintiff. There is strong circumstantial evidence in support of this fact.

Plaintiff could not be considered for Grade IV promotion unless defendant Sunstedt advised the director handling the file recommendations that he considered Ceballos one of his top three or four deputies who had scored outstanding in band 1. Defendant Sunstedt did no[t] make such a recommendation, and thus plaintiff was not promoted to Grade IV.

EVIDENTIARY SUPPORT

See, Exhibit (8) depo of Dinko Bozanich, at 142:12-25, 143:1-25, 144:1-25, 145:10-25, 148:10-25, Exhibit (7) depo of Gilbert

Garcetti, at 30:9-25, 31:1-25, 32:1-25, 33:1-25, Exhibit (4) depo of Richard Ceballos at 161:2-17; 162:24-25; 163:1-21, Exhibit (5) depo of Frank Sunstedt at 50:18-25; 51:1-2; 52:12-17

PLAINTIFF'S RESPONSE TO DEFENDANTS' CONCLUSIONS OF LAW

Plaintiff does not dispute Defendants' Conclusions of Law Nos. 1, 2, 3, 4, 5, 6, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25.

Plaintiff provides these additional Conclusions of Law:

1. Speech involves matter of public concern when it can fairly be considered to relate to "any matter of political, social or other concern to the community." *Connick v. Myers*, 461 U.S. at 146, 103 S.Ct. at 1690; *Johnson v. Multnomah County*, 48 F.3d at 422. Whether and employee's speech addresses a matter of public concern must be determined by the *content*, *form* and *context*, of a given statement, as revealed by the whole record. *Connick v. Myers*, 461 U.S. 147-148, 103 S.Ct. at 1690.

2. For speech to be of a public concern, it need *not be communicated publicly*. *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 415, 99 S.Ct. 693, 696-97 (1979) (Freedom of speech not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public").

3. In making its determination, the Court must arrive at *balance* between the interests of the public employees as a citizen, in commentating upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through employees. *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 568, 88 S.Ct. at 1734-35 (1968).

4. The State's burden in justifying a particular adverse employment action varies depending upon the nature of the employee's expression *Connick v. Myers*, 461 U.S. at 150, 103 S.Ct. at 1691.

5. A stronger showing may be necessary if the employee's speech more substantially involved matters of public concern. *Id.* at 152, 103 S.Ct. at 1692-93.

6. Moreover, a public employer has *no legitimate interest* in covering up *mismanagement or corruption*. *Johnson v. Moltnomah County*, 48 F.3d 420, 427 (9th Cir.) *cert. denied*, 515 U.S. 1161, 115 S.Ct. 2616 (1995).

7. *Voigt v. Savell*, 70 F.3d 1552, 1562 (9th Cir. 1995) cert. denied, 517 U.S. 1209, 116 S.Ct. 1826 (1996) (allegations of criminal wrongdoing and abuse of power involve matters of inherent public concern); *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992) (memorandum exposing, *inter alia*, abuses, potential civil rights violations, and incompetence of public officials addressed matters of public concern).

8. *Hufford v. McEnaney*, 249 F.3d 1142 (9th Cir. 2001) that in a goodfaith whistleblowing context, the breath of one's audience is irrelevant. *Id.* at 249 F.3d at 1151.

9. District attorneys have a First Amendment Right to keep the public informed, respond to media questions, and ask other law enforcement agencies to conduct their own investigation. *Bradbury v. Superior Court*, (1996) 49 Cal.App.4th 1108, 1113-1115; 57 Cal. Rptr. 207.

10. The more tightly the First Amendment embraces the speech, the more vigorous a showing of disruption must be made. *Hyland v. Wonder*, 972 F.2d at 1139.

11. Where government officials adopt and expressly approve of the acts of others who cause the constitutional violation, there is liability. *Hammond v. County of Madera*, 859 F.2d 797, 802-03 (9th Cir. 1988), disapproved on other grounds in *L.W. v. Grubbs*, 92 F.3d 894 (9th Cir. 1988).

DATED: January 14, 2002

MORENO, BECERRA,
GUERRERO & CASILLAS
A Professional Corporation

BY: /s/ Danilo J. Becerra
DANILO J. BECERRA, Esq.
Attorneys for Plaintiff
RICHARD CEBALLOS

DATED: January 14, 2002

LAW OFFICES OF HUMBERTO
GUIZAR

BY: /s/ Humberto Guizar
HUMBERTO GUIZAR, Esq.
Attorney for Plaintiff
RICHARD CEBALLOS

[PROOF OF SERVICE OMITTED IN PRINTING]

CINDY S. LEE, State Bar No. 168941
JIN S. CHOI, State Bar No. 180270
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, California 91101-3005
Telephone No. (626) 304-7830
Facsimile No. (626) 795-7460

Attorneys for Defendants
GIL GARCETTI, FRANK SUNDSTEDT, and
CAROL NAJERA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS, Plaintiff, vs. GIL GARCETTI, individually, and in his Official Capacity, FRANK SUNDSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive, Defendants.	Case No. CV 00-11106 AHM (AJWx) Honorable A. Howard Matz **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF INDIVIDUAL ISSUES; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JIN S. CHOI; EXHIBITS** [Declarations of Frank Sundstedt, Don Clem, Nancy Dukellis and Amy (Kuhnert) Glaudini; Defendants' Objections to Plaintiff's Evidence filed concurrently herewith] Date: January 28, 2002 Time: 10:00 a.m. Courtroom: 14

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

Defendants GIL GARCETTI, FRANK SUNDSTEDT and CAROL NAJERA hereby submit the following Memorandum of Points and Authorities, Declaration of Jin S. Choi, and Exhibits in response to plaintiff Richard Ceballos' Opposition to defendants' Motion for Summary Judgment, or Alternatively Summary Adjudication.

DATED: January 22, 2002

FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE

By /s/ Jin S. Choi for
Cindy S. Lee
Attorneys for Defendants
GIL GARCETTI,
FRANK SUNDSTEDT,
and CAROL NAJERA

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Plaintiff has made no showing as to why defendants should be denied qualified immunity. Indeed, cases analogous to the facts of this present case demonstrate that the speech in question here simply does not constitute a matter of public concern and is thus not protected by the First Amendment. Plaintiff certainly has not and cannot demonstrate that the law was clearly established that the speech in question constituted protected speech. Even if the speech is deemed to have been protected, plaintiff must still demonstrate that, under clearly established law, that the required balancing of factors clearly weighs in favor of him and against defendants in order to avoid a finding of qualified immunity. Plaintiff has not and cannot make this demonstration.

Moreover, rather than present any relevant or otherwise admissible evidence to refute defendants' legitimate and objectively reasonable basis for the employment actions at issue, plaintiff simply offers purely speculative and conclusory assertions that defendants' actions were motivated by retaliation. Reliance on such self-serving, unsubstantiated "evidence" is sufficient to overcome summary judgment.

Furthermore, while plaintiff seeks to hold defendants Najera, Sundstedt and Garcetti each personally liable, plaintiff fails to specify just how each defendant's conduct proximately caused or was otherwise responsible for the

purported adverse employment actions. For instance, even though the evidence is uncontroverted that defendant Sundstedt was the sole decision-maker with regard to plaintiff's transfer from calendar deputy to filing deputy and the reassignment of a murder case as well as non-assignment of new murder cases, plaintiff continues to attempt to hold defendants Najera and Garcetti personally liable for those employment actions. Finally, even though neither defendants Najera nor Sundstedt advised defendant Garcetti about plaintiff's opinions in the *Cuskey* matter and were simply not involved in the final decision-making process relating to the Grade Level IV promotions, plaintiff insists that they somehow caused him to be denied that promotion. Indeed, there is simply no evidence whatsoever that defendant Garcetti was even aware of plaintiff's opinions or involvement in the *Cuskey* matter before he approved the final recommendations of his Chief Deputy for the Grade Level IV promotions.

II. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW DID NOT CLEARLY ESTABLISH THAT THE SPEECH IN QUESTION WAS PROTECTED BY THE FIRST AMENDMENT.

To prevail on a First Amendment retaliation claim, a public employee must first establish that the speech in question was constitutionally protected. *Brewster v. Board of Education*, 149 F.3d 971, 978 (9th Cir. 1998). For the plaintiff's conduct to be constitutionally protected, 1) the speech must involve a matter of public concern; and 2) the plaintiff's interest in expressing himself must outweigh the government's interest in promoting workplace efficiency and avoiding workplace disruption. *Id.* Plaintiff

does not dispute the foregoing legal prerequisites. (See plaintiff's Response to Defendants' Conclusion of Law Nos. 5, 8 and 9.)

Based on plaintiff's Opposition, the only "speech" which led to the alleged acts of retaliation was his reporting of the sheriff's deputies' misconduct to defendants Najera and Sundstedt. Plaintiff presented his opinions on this matter in a "disposition memorandum" which was "prepared in the course and scope of his employment", "pursuant to his duties as a prosecutor." (Opp. at 4:13-14; 8:18; 10:16.) Based on plaintiff's own allegations regarding the nature of the speech in question, this Court cannot find that the law clearly established that this speech was a matter of public concern or otherwise protected by the First Amendment.

A. Because The Speech In Question Arose Within The Scope Of Plaintiff's Employment And Within Internal Office Setting, It Cannot Be Afforded First Amendment Protection.

The particular "context" in which the speech in question took place must be closely considered in determining whether that speech involves a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Plaintiff's opposition papers make clear that the speech upon which his First Amendment retaliation claims are based is the disposition memorandum he prepared regarding the *Cuskey* matter. (Opp. at 4:1-3, 4:13-14, 8:26-9:4, 9:13-15.) This memorandum, which was directed to defendant Sundstedt only, was prepared completely within the scope of plaintiff's employment and duties as a member of the district attorney's

office. These undisputed factors clearly weigh against any finding that the speech in question was protected by the First Amendment.

In *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001), the plaintiff, a former police officer who had been terminated, brought a section 1983 action against two of his supervisors, the chief of police, and the city, alleging that he had been retaliated against for his "speech as an [Office of Professional Standards] investigator". *Id.* at 940. The *Gonzalez* court affirmed the granting of the defendants' motion to dismiss on the ground that the speech in question – the **reports regarding police misconduct** that the plaintiff had written when he was an OPS investigator – **could not be characterized as the speech of a citizen upon matters of public concern.**

> "[T]he question before us is whether a public employee receives First Amendment protection for producing writings that may address matters of public concern, **but are also a routine requirement of the job**. [The plaintiff] may well have been motivated in part as a good citizen when he accepted the employment duties of reporting misconduct. Nevertheless, **he was clearly acting entirely in an employment capacity when he made those reports. The form of his speech (routine official reports), the content of the speech (required opinions on misconduct) and the context (pursuant to duties of the job), all indicate that [the plaintiff] did not speak 'as a citizen' on a matter of public concern**. . . . All of [the plaintiff]'s speech at issue – the written reports – was mandated in his capacity as an OPS investigator. While police misconduct is certainly a matter of public concern, the internal reports were

simply a summary of his findings following his official investigation."

Id. at 941-42 (emphasis added).

The *Gonzalez* court explained further that the "few courts that have addressed circumstances like these have found that the speech was not protected by the First Amendment." *Id.* at 942; *see Buazard v. City of Pocahontas*, 172 F.3d 546, 549 (8th Cir. 1999) (motion for summary judgment granted where a police officer's speech in question was not a matter of public concern where the statements were "entirely internal" in nature and the statements were "purely job-related"); *Thompson v. Scheid*, 977 F.2d 1017 (6th Cir. 1992) (speech made by public employee who investigated and wrote report on county commissioner acted in his role as fraud investigator and not citizen, and therefore did not speak on a matter of public concern warranting First Amendment protection); *see also Connick*, 461 U.S. at 143 ("The repeated emphasis in *Pickering* on the right of a public employee '**as a citizen**, in commenting upon matters of public concern,' was not accidental. This language, reiterated in all of *Pickering*'s progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.") (footnotes omitted, emphasis added).[1]

[1] Plaintiff has not cited any cases which held that a statement, made strictly within the scope of the plaintiff's employment duties, and which was made in an entirely internal setting, involved a matter of public concern. Indeed, the instant case is substantively different from those cases where the speech, rather made internally or not, was not uttered within the scope of the plaintiff's employment. *See, e.g., Rankin*

(Continued on following page)

The facts in *Gonzalez* are remarkably analogous to the facts at issue in the instant case. As in *Gonzalez*, the speech in question – the disposition memorandum – pertained to alleged police misconduct, was entirely internal in nature, and prepared, as plaintiff admits, in the scope of his employment and pursuant to his duties as a prosecutor. Moreover, the crux of the memorandum was that the *Cuskey* case should be dismissed due to the questions regarding the deputies' affidavit; the decision whether to dismiss the case should certainly be characterized as an "internal office affair". *Connick*, 461 U.S. at 149. Indeed, regardless of whether the subject about which the speech was made was a matter of public concern, the undisputed facts regarding the circumstances under which the disposition memorandum was prepared establishes, as a matter of law, that plaintiff is not entitled to any protection under the First Amendment.[2]

At the very least, the case law discussed above removes any question as to whether, in March 2000, the law clearly established that the speech in question must be characterized as a matter of public concern. Due to the absence of such clearly established law, without proceeding

v. McPherson, 483 U.S. 386, 107 S.Ct. 2801, 97 L.Ed.2d 315 (1987) (clerical worker made statement regarding President Reagan's assassination attempt); *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (police officer, in his role as a representative of a labor organization, publicly criticized the city's decision to not give the police a raise and discussed "the working relationship between the police union and elected city officials").

[2] To the extent that plaintiff's First Amendment claim is based on any other speech related to his investigation and conclusions regarding the *Cuskey* matter, the analysis dictated by *Gonzalez* is not affected since plaintiff concedes that he engaged in all such speech while he was "fulfilling his duties as a prosecutor". (Opp. at 10:20-21.)

any further in the required First Amendment analysis, defendants' entitlement to qualified immunity is apparent and should therefore be recognized.[3]

B. Based On The Balancing Required Under Pickering, This Court Cannot Find That The Law Clearly Established That Plaintiff's Speech Was Constitutionally Protected.

Even if a plaintiff's speech is deemed to have been of public concern, the court must still determine whether the speech "merits constitutional protection". *Brewster*, 149 F.3d at 979. In making this determination, the court must employ the balancing test articulated in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) – whether the plaintiff's interest in

[3] Plaintiff's assertion that defendant Najera violated *Brady v. Maryland* by ordering him to not produce his disposition memorandum to the criminal defendant is nothing more than a red herring. (Opp. at 5:1-5; 10:17-21.) Not only does this allegation have absolutely no nexus to plaintiff's First Amendment retaliation claim, it has no probative value since defendant Najera is entitled to absolute prosecutorial immunity for any acts undertaken in preparing for the initiation of a judicial proceeding. *Buckley v. Fitzsimmons*, 509 U.S. 259, 272-73, 113 S.Ct. 2606, 125 L.Ed.2d 209. Moreover, plaintiff's discussion of *Bradley v. Superior Court*, 49 Cal.App.4th 1108 (1996) is misplaced. This case is cited for the proposition that "district attorneys have a First Amendment Right to keep the public informed, respond to media questions, and ask other law enforcement agencies to conduct their own investigation." (Opp. at 9:25-27.) However, there is absolutely no evidence that plaintiff engaged in any of these actions in engaging in the "speech" upon which his First Amendment retaliation claim is based. The holding in *Bradley* does not enable plaintiff to overcome the fact that all of the speech in question was engaged fell completely within the scope of his employment and therefore cannot be deemed to have implicated a public concern, within the meaning of the required First Amendment analysis.

expressing himself outweighs the government's interest in promoting workplace efficiency and avoiding workplace disruption. *See Voigt v. Saveli*, 70 F.3d 1552, 1560-61 (9th Cir. 1995) (*Pickering* "requires particularized balancing on the unique facts presented in each case"). Because this determination "requires a fact-sensitive, context-specific balancing of competing interests, the law regarding public-employee free speech claims will 'rarely, if ever, be sufficiently "clearly established" to preclude qualified immunity". *Brewster*, 149 F.3d at 980. The court must decide "whether the outcome of the *Pickering* balance **so clearly favored [the plaintiff]** that it would have been patently unreasonable for the school officials to conclude that the First Amendment did not protect his speech." *Id.* (emphasis added).

In *Brewster*, the court assumed that the plaintiff's charges regarding miscalculation of school attendance records did implicate the public concern. However, the court also found that a "number of balancing considerations weigh in favor of the school officials": 1) whether the harmony among co-workers was disrupted; 2) whether the relevant working relationship is a close one which requires trust and respect; 3) whether the speech interferes with the fulfillment of his office duties; 4) whether the speech was directed to the public or the media since a narrow, limited focus and a limited audience weigh against a claim of protected speech; and 5) whether the allegations raised were determined to be false. *Id.* at 980-81.

Furthermore, the court explained that because both parties could "point to important interests supporting their respective sides of the *Pickering* balance", the question of whether the plaintiff's speech was protected was a "close one". *Id.* at 981. Nevertheless, the court held that it

need not resolve the merits, and that it had a "'much simpler task' . . . of deciding whether the *Pickering* test so clearly favors [the plaintiff] that it would have been unreasonable for the officials to believe that [the alleged retaliatory act] was lawful." *Id.* Specifically, based on the "competing considerations on each side of the *Pickering* balance", it could not conclude that the plaintiff's "right to speak was sufficiently 'clearly established' to defeat the school officials' assertion of qualified immunity.'" *Id.*

Plaintiff's very limited discussion of this important part of the required First Amendment analysis not only fails to address the clear implications of the instructions and holding of *Brewster*, but raises an argument which has no relevance whatsoever. (*See* Opp. at 12:20-13:9.)[4] Indeed, in the instant case, several of the factors identified in *Brewster* clearly weigh against the denial of qualified immunity. For purposes of this instant motion, the evidence is unrefuted that the working relationship between plaintiff and defendants was one which required professional trust and respect (*see* Sundstedt Depo., 29:17-30:5, 30:22-25, 31:17-23, 96:5-97:1, 110:11-111:17, attached

[4] Plaintiff contends that the Ninth Circuit has "drawn a clear line for government employers where the employee's speech involves wrongdoing or corruption, the disruption generated by an employee's accurate exposition of such conduct should not be factored into the *Pickering* balance." (Opp. at 13:3-6.) Although far from clear, plaintiff seems to suggest that because his speech exposed wrongdoing, the disruption which may have resulted should not be weighed in favor of a finding of qualified immunity. This suggestion should be rejected in light of the ruling at the motion to traverse hearing (as well as the ultimate convictions in the *Cuskey* case) which is inconsistent with the assertion that wrongdoing was exposed. Thus, the disruption which did result can and should be considered, in favor of defendants and against plaintiff.

hereto as Exhibit "H"); that the harmony between them was disrupted (Opp. at 5:10-15, 14:17-18, 16:14-18); and that the speech in question was directed to a very limited audience (Opp. at 4:1-3). Moreover, the truth of plaintiff's fundamental contention regarding the deputies' conduct was placed in serious doubt by the ruling at the motion to traverse hearing.

Thus, based on the breakdown of these factors, the finding that the law clearly established that plaintiff's speech was constitutionally protected simply cannot be made, thereby entitling defendants to qualified immunity. Plaintiff has presented no argument to preclude this ruling.

III. DEFENDANTS' ACTIONS WERE OBJECTIVELY REASONABLE.

Defendants have set forth a detailed explanation, which is supported by ample evidence, as to why their alleged acts of retaliation were objectively reasonable. Plaintiff's argument consists of nothing more than a regurgitation of the allegations of his complaint, without any assertions based on concrete admissible evidence, which adequately rebuts defendants' argument and corresponding evidence. (Opp. at 13:20-15:15.) Indeed, plaintiff's argument is replete with purely conclusory and speculative assertions. *See Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097, 2109 (2000) ("an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a **weak issue of fact** as to whether the employer's reason was untrue and there was abundant and

uncontroverted independent evidence that no discrimination had occurred.") (emphasis added); *see also* Objections to Plaintiff's Evidence filed concurrently herewith.

Furthermore, the declarations submitted for the proposition that no one in the El Monte (otherwise known as Rio Hondo) area office ever requested another full-time filing deputy is simply irrelevant. The material undisputed fact is that defendant Sundstedt, as the Head Deputy District Attorney for the Pomona Branch Office, determined that the El Monte area office should, just like the other area offices of the Pomona Branch, be staffed with two full-time filing deputies. The opportunity to assign two full-time filing deputies arose in 1998 when the only filing deputy there, Mike Davis, transferred to a Los Angeles area office. (See Declaration of Sundstedt, ¶ 2.) Indeed, defendant Sundstedt's experience with previous Deputies in Charge of the El Monte area office was that, due to the fact that the office had only one full-time filing deputy, they often had to file cases themselves which took valuable time away from their ability to mentor and supervise the new deputies in their offices. (Sundstedt Dec., ¶ 3.) Moreover, at no time did the Deputy in Charge of the El Monte area office ever advise defendant Sundstedt that having two full-time filing deputies was not necessary. (Sundstedt Dec., ¶ 3.)

Furthermore, plaintiff's broad, conclusory assertion that there had been "no prior taking away of murder cases from any deputy district attorney to extend experience to lesser experienced attorneys" (Opp. at 14:26-27) has not been substantiated with anything close to sufficient evidence and has also been directly refuted. (Sundstedt Dec., ¶ 4; Kuhnert Dec., ¶ 5; Clem Dec., ¶ 5; Dukellis Dec., ¶ 5.) Plaintiff's factually unsupported contention that he

was the only calendar deputy from the Pomona Branch to have been assigned to a filing deputy position is also patently false. (Sundstedt Dec., ¶¶ 5-6; Kuhnert Dec., ¶¶ 3-4.)

Thus, even if the speech in question is found to be protected by the First Amendment, defendants are still entitled to qualified immunity because their alleged retaliatory actions were, in actuality, objectively reasonable and not improperly motivated.[5]

IV. PLAINTIFF FAILS TO PRESENT SUFFICIENT EVIDENCE OF PROXIMATE CAUSATION BETWEEN DEFENDANT SUNDSTEDT'S ALLEGED ACTIONS AND HIS DENIAL OF PROMOTION.

It is not reasonably disputed that defendant Sundstedt was the decision-maker with regard to all the alleged adverse employment actions at issue with the exception of plaintiff's denial of the Grade IV promotion. As more fully set forth above, there is ample unrefuted evidence demonstrating the legitimate and objectively reasonable grounds for the alleged adverse employment actions directed by defendant Sundstedt as the Head Deputy District Attorney of the Pomona Branch Office. Regarding plaintiff's denial of the Grade IV promotion,

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[5] By the same token, additional grounds for dismissing plaintiff's section 1983 claim are that 1) plaintiff has failed to prove that his speech was a substantial or motivating factor in the alleged retaliation and 2) defendants would have engaged in the same actions even in the absence of the speech in question. *Brewster*, 149 F.3d at 978. Indeed, contrary to plaintiff's bald assertion (Opp. at 15:12-14), there is no admissible evidence which establishes that plaintiff's speech was the substantial or motivating factor in the alleged constitutional deprivations.

just like any other section 1983 claim, a plaintiff must establish that the alleged constitutional deprivation was proximately caused by the purported misconduct. *Estate of Brooks ex rel. Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir. 1999) (where "the element of causation is missing from the § 1983 claim, . . . dismissal with prejudice was proper"); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 837 (9th Cir. 1996) (proximate cause analysis of traditional tort law applies in section 1983 actions).

Plaintiff here contends that he was deprived of a promotion to Grade Level IV because defendant Sundstedt refused to recommend him to director George Knoke; such a communication "would have allowed his name to be submitted to [defendant Garcetti] for promotion." (Opp. at 15:4-7.) However, plaintiff has not and cannot present any admissible evidence that defendant Sundstedt's alleged actions proximately caused the denial of his promotion. In fact, the undisputed facts point to a contrary conclusion. Plaintiff was one of eight candidates for promotion who received the same outstanding rating from Sundstedt. Out of the four candidates who were ultimately promoted from the Pomona Branch Office, one was not even recommended by Sundstedt (Manny Garcia) and the candidate who was his second choice (Randy Harris) was not promoted. Thus, because there is no evidence the promotion hinged upon defendant Sundstedt's recommendation, there is no basis for finding that defendant Sundstedt engaged in any action which proximately caused the denial of promotion.

V. THE ALLEGATIONS AGAINST DEFENDANT GARCETTI PRECLUDE ANY FINDING OF SECTION 1983 LIABILITY.

As an initial matter, plaintiff has failed to present any admissible evidence to refute that Garcetti had no knowledge about plaintiff's opinions relating to the *Cuskey* case prior to the publication of the Grade IV promotion list. Plaintiff simply contends that defendant Garcetti should be held liable for the purported First Amendment violations simply because a few days prior to the denial of plaintiff's grievance, James Blancarte advised him of plaintiff's actions, and defendant Garcetti "did nothing to prevent the continued constitutional violation of plaintiff's rights", thereby ratifying "ratifying" the alleged misconduct of defendants Najera and Sundstedt. (Opp. at 15:19-16:8.) This theory of relief, on its face, is groundless since it lacks any basis for finding the required element of causation between the purported constitutional deprivations and any action by defendant Garcetti.[6]

Moreover, even if defendant Garcetti engaged in any action with regard to the grievance (which he did not), such action would not satisfy the proximate causation requirement which governs plaintiff's section 1983 claim.

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[6] Plaintiff's reliance on *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995) is both misplaced and misleading. (Opp. at 16:2-5.) In *Fuller*, the Chief of Police was dismissed as a defendant, and the "delegation/ratification" theory of relief was only discussed in the context of the plaintiff's *Monell* claim against the City. In other words, this theory did not provide any basis for preserving an individual capacity section 1983 claim against the Chief. *Id.* at 1526, 1534-35. Plaintiff's reliance on *Hammond v. County of Madera*, 859 F.2d 797 (9th Cir. 1988) is also misplaced since its section 1983 liability analysis was also strictly limited to the plaintiff's *Monell* claim against the County – not an individual capacity section 1983 claim.

Plaintiff cannot dispute that all of the alleged adverse employment actions, including the denial of promotion to Grade IV, had already taken place by the time the grievance was filed. Indeed, those employment decisions were the subject matter of his employment grievance. (See copy of the relevant documents relating to plaintiff's employment grievance attached hereto as Exhibit "G.") Therefore, because the alleged misconduct on the part of defendant Garcetti simply could not have played any causal role in the alleged constitutional deprivations, the section 1983 claim against defendant Garcetti must be dismissed.

VI. PLAINTIFF FAILS TO PRESENT ANY VIABLE ARGUMENT AGAINST THE DISMISSAL OF HIS INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM.

This state law claim is only directed against defendants Najera and Sundstedt. Plaintiff does not raise any argument which specifically responds to the arguments raised in defendants' Motion. In particular, plaintiff ignores the holding in *Janken v. G.M. Hughes Electronics*, 46 Cal.App.4th 55 (1996) that even improperly motivated management decisions do not provide a basis for an intentional infliction of emotional distress claim. Plaintiff also does not respond to defendants' contention that plaintiff failed to set forth any substantive factual explanation in his complaint in support of his emotional distress claim. Thus, plaintiff's state law claim should be summarily dismissed as well.

VII. CONCLUSION

For the reasons set forth above, and in the moving papers, defendants Gil Garcetti, Frank Sundstedt and Carol Najera respectfully request that the Court grant their Motion for Summary Judgment against plaintiff in its entirety. Alternatively, defendants request that the Court summarily adjudicate issues in favor of defendants as set forth in the Notice of this Motion.

DATED: January 22, 2002

FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE

By Jin S. Choi for
Cindy S. Lee
Attorneys for Defendants
GIL GARCETTI,
FRANK SUNDSTEDT,
and CAROL NAJERA

DECLARATION OF JIN S. CHOI

I, Jin S. Choi, declare as follows:

1. I am an attorney at law, duly licensed to practice before this Court and all of the courts of the State of California, and am an associate of the law firm of Franscell, Strickland, Roberts & Lawrence, attorneys of record for defendants Gil Garcetti, Frank Sundstedt and Carol Najera in the above-captioned action. The matters stated herein are within my personal knowledge and, if duly sworn, I could and would competently testify thereto.

2. Attached hereto as Exhibit "G" is a true and correct copy of plaintiff Richard Ceballos' employment grievance and findings relating to the same which were exchanged at the Early Meeting of Counsel.

3. Attached hereto as Exhibit "H" is a true and correct copy of the cover page and referenced pages of the deposition transcript of Frank Sundstedt.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 21st day of January 2002, at Pasadena, California.

/s/ Jin S. Choi
Jin S. Choi

EXHIBIT "G"

DEPARTMENT OF THE DISTRICT ATTORNEY
GRIEVANCE FORM

DATE: SEPTEMBER 5. 2000

EMPLOYEE : RICHARD CEBALLOS
POSITION : DEPUTY D.A. III

OFFICE/DIV : EL MONTE AREA
POMONA BRANCH
TELEPHONE : 909-620-3350

ADDRESS : 400 CIVIC CENTER PLAZA, ROOM 201,
POMONA, CA 91766

EMPLOYEE REPRESENTATIVE: TO BE ANNOUNCED

NATURE OF GRIEVANCE :
[SEE ATTACHED]

REQUESTED REMEDY :
[SEE ATTACHED]

INFORMAL DISCUSSION WITH
IMMEDIATE SUPERIOR: NOT HELD

EMPLOYEE SIGNATURE: /s/ Richard Ceballos

IMMEDIATE SUPERVISOR'S
NAME AND SIGNATURE: NOT OBTAINED

DATE RECEIVED: _____

NATURE OF GRIEVANCE

I.

INTRODUCTION

I, RICHARD CEBALLOS, ALLEGE THE FOLLOWING:

THAT POMONA HEAD DEPUTY FRANK SUNDSTEDT AND ASSISTANT HEAD DEPUTY CAROL NAJERA HAVE DELIBERATELY, WILLFULLY, AND INTENTIONALLY ENGAGED IN A CAMPAIGN OF HARASSMENT, RETALIATION, AND REPRISAL AGAINST ME, AS A RESULT OF MY REPORTING THAT CERTAIN POLICE OFFICERS MAY HAVE FABRICATED PROBABLE CAUSE IN ORDER TO OBTAIN A SEARCH WARRANT, AND MY SUBSEQUENT TESTIMONY TO THAT EFFECT, IN THE CASE OF THE *PEOPLE OF THE STATE OF CALIFORNIA VS MICHAEL CUSKEY,* ET AL (POMONA SUPERIOR COURT NO. KA045491)

THAT ASSISTANT HEAD DEPUTY CAROL NAJERA KNOWINGLY AND MALICIOUSLY ATTEMPTED TO DISSUADE ME FROM TESTIFYING IN THE AFOREMENTIONED CASE IN VIOLATION OF PENAL CODE SECTION 136.1(C)(2).

THAT, AS A DIRECT RESULT OF THE POSITION I TOOK AND THE TESTIMONY I GAVE, IN THE

AFOREMENTIONED CASE, FRANK SUNDSTEDT AND CAROL NAJERA HAVE CREATED AND MAINTAINED A HOSTILE WORK ENVIRONMENT FOR ME. SPECIFICALLY, THEY DEMOTED ME FROM THE POSITION OF CALENDAR DEPUTY TO THAT OF TRIAL DEPUTY; THEY TOOK A MURDER CASE PREVIOUSLY ASSIGNED TO ME AND REASSIGNED IT TO ANOTHER LESS EXPERIENCED DEPUTY WITH NO MURDER TRIAL EXPERIENCE; THEY HAVE REFUSED TO ASSIGN ME ANY NEW MURDER CASES EVEN THOUGH LESSER EXPERIENCED DEPUTIES CONTINUE TO BE ASSIGNED THESE TYPES OF CASES; THEY ORDERED MY TRANSFER TO THE EL MONTE AREA OFFICE, AND THEY WILLFULLY AND MALICIOUSLY INFLUENCED THIS OFFICE'S DECISION TO DENY ME A GRADE IV PROMOTION.

II.

FACTS

1. ON OR ABOUT MARCH 2, 2000, I SUBMITTED A MEMO (ATTACHED AS EXHIBIT NO. 1) TO HEAD DEPUTY FRANK SUNDSTEDT, ESSENTIALLY ADVISING HIM THAT I BELIEVED THAT CERTAIN POLICE OFFICERS HAD FABRICATED PROBABLE CAUSE IN ORDER TO SECURE A SEARCH WARRANT IN VIOLATION OF *FRANKS V. DELAWARE*, AND REQUESTING PERMISSION TO DISMISS THE INFORMATION AGAINST THE NAMED DEFENDANTS PURSUANT TO PENAL CODE SECTION 1385.

2. ON OR ABOUT MARCH 3, 2000, FRANK SUNDSTEDT FAXED A COPY OF MY MEMO TO LOS

ANGELES SHERIFF'S CAPTAIN ROBERT BINKLEY OF THE INDUSTRY SHERIFF'S STATION.

3. ON OR ABOUT MARCH 9, 2000, A MEETING WAS HELD IN FRANK SUNDSTEDT'S OFFICE TO DISCUSS THE AFOREMENTIONED CASE. PRESENT AT THE MEETING WERE: FRANK SUNDSTEDT, ASSISTANT HEAD DEPUTY CAROL NAJERA, MYSELF, DDA STEVEN GALLON, CAPTAIN BINKLEY (INDUSTRY STATION), LIEUTENANT ED BARSTOW (INDUSTRY STATION) AND THE AFFIANT OF THE SEARCH WARRANT, DETECTIVE KEITH WALLS. DURING THIS MEETING, LIEUTENANT ED BARSTOW VERBALLY ATTACKED ME AND DEMANDED THAT I BE REMOVED FROM THE CASE BECAUSE HE FELT, AMONG OTHER THINGS, THAT I WAS "ACTING LIKE A DEFENSE ATTORNEY AND NOT A PROSECUTOR," BECAUSE I CONCLUDED THAT THE WARRANT WAS INVALID AND SHOULD BE QUASHED. AT NO TIME DID FRANK SUNDSTEDT OR CAROL NAJERA INTERRUPT OR STOP THE LIEUTENANT FROM VERBALLY ATTACKING ME. THEY MERELY SAT AND LISTENED. IN ADDITION, CAPTAIN BINKLEY STATED DURING THE MEETING THAT HE WAS CONCERNED THAT ONE OF THE DEFENDANTS IN THIS CASE WOULD FILE A LAWSUIT AGAINST THE SHERIFF'S DEPARTMENT IF WE DISMISSED THE CASE (IT WAS LATER LEARNED DEFENDANT CUSKEY HAD FILED A FEDERAL CIVIL RIGHTS LAWSUIT AGAINST DEPUTY SIMPKINS PRIOR TO THE ISSUANCE OF THIS SEARCH WARRANT. THIS FACT, HOWEVER, WAS NOT DISCLOSED TO THE JUDGE WHO REVIEWED AND ULTIMATELY SIGNED THE WARRANT). AT THE CONCLUSION OF THE MEETING, FRANK SUNDSTEDT

INFORMED THE CAPTAIN THAT THE MATTER WOULD PROCEED TO MOTION NOTWITHSTANDING "OBVIOUS PROBLEMS" WITH THE SEARCH WARRANT. AFTER THE CAPTAIN, LIEUTENANT, AND DETECTIVE DEPARTED, I COMPLAINED TO FRANK SUNDSTEDT THAT IT APPEARED THAT HE WAS "KOWTOWING" TO THE SHERIFF'S DEPARTMENT SIMPLY BECAUSE OF THEIR EXPRESSED FEAR OF POSSIBLE CIVIL LITIGATION.

4. ON OR ABOUT MARCH 14, 2000, I INFORMED FRANK SUNDSTEDT AND CAROL NAJERA THAT I HAD BEEN SUBPOENAED TO TESTIFY AT THE MOTION TO TRAVERSE BY ONE OF THE DEFENSE ATTORNEY'S IN THE AFOREMENTIONED CASE. I FURTHER INFORMED CAROL NAJERA THAT PORTIONS OF MY MEMO TO FRANK SUNDSTEDT, DATED MARCH 2, 2000, AND AN ADDENDUM TO THIS MEMO, DATED MARCH 6, 2000, CONTAINED STATEMENTS BY DETECTIVE WALLS THAT SHOULD BE TURNED OVER TO THE DEFENSE PRIOR TO THIS HEARING. CAROL NAJERA THEN INSTRUCTED ME TO PREPARE AN ENTIRELY NEW MEMO OR REPORT DETAILING ONLY THE DETECTIVE'S STATEMENTS AND OMITTING ALL THE OTHER INFORMATION WHICH WAS CONTAINED IN MY MEMO. I INFORMED MS. NAJERA THAT I DID NOT BELIEVE THAT PREPARING A NEW AND SEPARATE REPORT OR MEMO WAS THE APPROPRIATE COURSE TO TAKE. RATHER I SUGGESTED THAT MY MEMO SHOULD BE TURNED OVER TO THE DEFENSE IN ITS PRESENT FORM WITH THE PORTIONS THAT WERE CLEARLY ATTORNEY WORK PRODUCT "BLACKED OUT". MS. NAJERA ANGRILY RESPONDED THAT I WAS "WRONG" AND

SHE DEMANDED THAT I PREPARE A NEW REPORT OR MEMO AS SHE DIRECTED. I TOLD MS. NAJERA THAT I DID NOT BELIEVE HER APPROACH WAS ETHICAL AND THAT I WOULD NOT DO AS SHE ORDERED. GEORGE PALMER OF THE PROFESSIONAL RESPONSIBILITY UNIT WAS THEN CONTACTED BY MS. NAJERA, AND HE CONCURRED THAT MY POSITION WAS THE CORRECT AND ETHICAL APPROACH.

5. ON OR ABOUT MARCH 16, 2000, ASSISTANT HEAD DEPUTY CAROL NAJERA CALLED ME INTO HER OFFICE IN ORDER TO DISCUSS THE AFOREMENTIONED CASE. MS. NAJERA BEGAN BY STATING THAT SHE FELT THAT I WAS "DEAD WRONG" IN MY ASSESSMENT OF THE CASE AND THE VALIDITY OF THE SEARCH WARRANT. SHE STATED THAT, IN HER OPINION, THE DETECTIVE (KEITH WALLS) HAD SIMPLY MADE A MENTAL ERROR IN DRAFTING THE SEARCH WARRANT, ESPECIALLY AS IT RELATED TO HIS USE OF THE WORD "DRIVEWAY", AND THAT THERE WAS NO ATTEMPT TO MISLEAD OR DECEIVE THE MAGISTRATE. I RESPONDED TO MS NAJERA THAT I DISAGREED WITH HER ASSESSMENT AND OPINION AND FELT STRONGLY THAT THE DEPUTIES AND DETECTIVE HAD INTENTIONALLY AND DELIBERATELY FABRICATED PROBABLE CAUSE IN ORDER TO SECURE THE SEARCH WARRANT. I BASED MY OPINION, IN PART, ON THE FACT THAT ONE OF THE DEFENDANTS HAD PREVIOUSLY FILED A FEDERAL CIVIL RIGHTS LAWSUIT AGAINST DEPUTY SIMPKINS, WHO WAS ONE OF THE DEPUTIES WHO ALLEGEDLY OBSERVED THE SO-CALLED "TIRE TRACKS", AND, ALSO IN PART, ON THE FACT

THAT A NARCOTICS DETECTING CANINE WAS USED IN THE SEARCH FOR STOLEN AUTO PARTS. MS. NAJERA BEGAN TO GET IRRITATED WITH ME. SHE RAISED HER VOICE AND KEPT INSISTING THAT MY ASSESSMENT DID NOT MAKE ANY SENSE. SHE THEN ASKED ME TO EXPLAIN MY POSITION MORE CLEARLY. I RESPONDED THAT, IN EFFECT, I HAD MADE MY POSITION AS CLEAR AS POSSIBLE. I INFORMED HER THAT MY POSITION WOULD NOT CHANGE AND THAT IF I WERE ASKED DURING THE UPCOMING HEARING FOR MY OPINION REGARDING THE VALIDITY OF THE SEARCH WARRANT THAT I WOULD STATE THAT I BELIEVED IT WAS INVALID IN ACCORDANCE WITH THE *FRANKS V. DELAWARE* DECISION. MS. NAJERA THEN BEGAN SHAKING HER HEAD BACK AND FORTH AND STATED TO ME "IF YOU KEEP THINKING LIKE THAT... TALKING LIKE THAT, YOU'RE GOING TO GET YOURSELF IN TROUBLE WITH THIS OFFICE." AFTER HEARING THIS STATEMENT, I FELT MS. NAJERA WAS ATTEMPTING TO DISSUADE ME FROM TESTIFYING TRUTHFULLY. I HAD THE DISTINCT IMPRESSION THAT IF I TESTIFIED TRUTHFULLY AT THE UPCOMING HEARING ON THE MOTION TO TRAVERSE, THERE WOULD BE SOME FORM OF RETALIATION OR REPRISAL BY FRANK SUNDSTEDT AND CAROL NAJERA.

6. ON OR ABOUT MARCH 20, 2000, THE HEARING ON THE MOTION TO TRAVERSE TOOK PLACE IN DEPARTMENT "E" OF POMONA SUPERIOR COURT. THE DEFENSE CALLED ME AS A WITNESS. CAROL NAJERA HAD DETECTIVE WALLS REMAIN IN THE

COURTROOM, SITTING NEXT TO HER. AS I TESTIFIED, CAROL NAJERA MADE NUMEROUS OBJECTIONS BOTH IN AND OUT OF MY PRESENCE CONCERNING THE SCOPE AND LIMITS OF MY TESTIMONY. WHILE ON THE STAND, CAROL NAJERA TREATED ME AS IF I WERE A HOSTILE WITNESS. SHE BECAME VISIBLY UPSET AT SOME OF MY RESPONSES, REPEATEDLY SHAKING HER HEAD BACK AND FORTH AS IF IN ANGER. AFTER THE HEARING, SHE CALLED ME INTO HER OFFICE AND TOLD ME THAT SHE "WANTED TO SHUT ME UP" AS I WAS TESTIFYING DURING THE HEARING.

7. SUBSEQUENT TO THIS HEARING, BOTH FRANK SUNDSTEDT AND CAROL NAJERA HAVE ESSENTIALLY RETALIATED AGAINST ME AS A RESULT OF THE POSITION I TOOK AND THE TESTIMONY I GAVE IN THIS CASE. THEY DEMOTED ME FROM THE POSITION OF CALENDAR DEPUTY TO THAT OF TRIAL DEPUTY, DESPITE MY HAVING BEEN A CALENDAR DEPUTY FOR OVER A YEAR, AND FRANK SUNDSTEDT'S "OUTSTANDING" RATINGS ON MY PERFORMANCE EVALUATIONS FOR THE PAST TWO YEARS.

8. ON AUGUST 25, 2000, I WAS DENIED A GRADE IV PROMOTION DESPITE THE FACT THAT I HAVE A 100 A.P. AND AM IN BAND ONE. I FEEL THAT I AM CLEARLY DESERVING OF THE PROMOTION, GIVEN MY ELEVEN YEARS OF EXPERIENCE, MY NUMBER OF FELONY TRIALS, MY CALENDAR DEPUTY EXPERIENCE, MY POSITION AS AN INSTRUCTOR WITH THE NATIONAL COLLEGE OF DISTRICT ATTORNEYS, AND MY CONSISTENT "OUTSTANDING" PERFORMANCE EVALUATIONS. I BELIEVE THAT, DESPITE

THESE QUALIFICATIONS, FRANK SUNDSTEDT AND CAROL NAJERA WILLFULLY AND MALICIOUSLY INFLUENCED THIS OFFICE IN DENYING MY PROMOTION TO GRADE IV, AS FURTHER RETALIATION FOR MY ACTIONS IN THE *CUSKEY* CASE.

9. ON AUGUST 28, 2000, CAROL NAJERA CALLED ME INTO HER OFFICE. SHE INFORMED ME THAT MY ASSIGNMENT WAS GOING TO CHANGE. SHE TOLD ME THAT IF I WANTED TO REMAIN IN POMONA THAT I WOULD HAVE TO FILE ONLY MISDEMEANORS. SHE THEN SAID THAT IF I DID NOT WANT TO FILE MISDEMEANORS, SHE WOULD TRANSFER ME TO THE EL MONTE AREA OFFICE. SHE THEN ASKED ME TO CHOOSE. I INFORMED MS. NAJERA THAT I WAS NOT GOING TO CHOOSE BECAUSE I DID NOT WANT TO DO EITHER. I FELT THAT, GIVEN MY YEARS OF EXPERIENCE, FILING MISDEMEANOR CASES WAS CLEARLY A PUNITIVE ACT ON THE PART OF MS. NAJERA. I ALSO DID NOT WANT TO GO EL MONTE AS IT WOULD BE A LONGER COMMUTE IN HEAVY TRAFFIC FOR ME. SHE TOLD ME THAT, IF I DID NOT CHOOSE ONE OF THESE OPTIONS, SHE WOULD SEND ME TO EL MONTE EFFECTIVE SEPTEMBER 5, 2000. I FEEL THAT HER CONDUCT IN THIS INSTANCE, RESULTING IN MY TRANSFER, IS FURTHER EVIDENCE OF THE RETALIATORY AND VINDICTIVE BEHAVIOR THAT FRANK SUNDSTEDT AND CAROL NAJERA HAVE DEMONSTRATED EVER SINCE THE SUPPRESSION HEARING IN THE *CUSKEY* CASE.

REQUESTED REMEDIES

1. THAT THE DISTRICT ATTORNEY SPECIFICALLY ORDER SUPERVISORS FRANK SUNDSTEDT AND CAROL NAJERA TO IMMEDIATELY CEASE ANY AND ALL PUNITIVE, RETALIATORY, AND HARASSING CONDUCT TOWARDS MYSELF.

2. THAT THE ISSUE CONCERNING CAROL NAJERA'S ATTEMPT TO DISSUADE ME FROM TESTIFYING IN THE MATTER OF THE *PEOPLE OF THE STATE OF CALIFORNIA V. MICHAEL CUSKEY, ET AL* (POMONA SUPERIOR CASE NO. KA045491) BE REFERRED TO THE CALIFORNIA ATTORNEY GENERAL'S OFFICE FOR POSSIBLE CRIMINAL PROSECUTION [PENAL CODE SECTION 136.1(A)(2)].

3. THAT THE DISTRICT ATTORNEY FORMULATE AND INSTITUTE A FORMAL, OFFICE WIDE POLICY FOR THOSE INSTANCES IN WHICH A DEPUTY D.A. HAS REASON TO BELIEVE THAT A LAW ENFORCEMENT OFFICER MAY HAVE COMMITTED PERJURY, GIVEN FALSE OR MISLEADING TESTIMONY OR DECLARATION, PLANTED EVIDENCE, OR COMMITTED SOME OTHER FORM OF MISCONDUCT, WHICH DIRECTLY OR INDIRECTLY AFFECTS THE INTEGRITY OF THE JUDICIAL SYSTEM. THE POLICY SHOULD SPECIFICALLY ENCOURAGE ALL DISTRICT ATTORNEY PERSONNEL TO REPORT ANY INCIDENTS OF SUSPECTED POLICE MISCONDUCT WITHOUT FEAR OF REPRISAL OR OTHER PUNITIVE ACTION BY THIS OFFICE. THE POLICY SHOULD ALSO DIRECT SUPERVISORS THAT THEY MUST NOT, IN ANY WAY, DISCOURAGE THE REPORTING OF POLICE MISCONDUCT AND MUST NOT TAKE ANY

PUNITIVE, RETALIATORY, OR OTHER SIMILAR ACTION AGAINST AN EMPLOYEE WHO REPORTS SUCH MISCONDUCT. FURTHER, THE POLICY SHOULD OBLIGATE THE SUPERVISOR TO PROTECT THE EMPLOYEE FROM BEING SUBJECTED TO ANY FORM OF HARASSMENT OR REPRISAL FROM THE INVOLVED LAW ENFORCEMENT OFFICER OR AGENCY.

4. THAT THE DISTRICT ATTORNEY DIRECT THE OFFICE'S SPECIAL INVESTIGATIONS DIVISION (SID) TO CONDUCT A THOROUGH INVESTIGATION INTO THE VALIDITY OF THE SEARCH WARRANT IN THE CASE OF THE *PEOPLE OF THE STATE OF CALIFORNIA V. MICHAEL CUSKEY ET AL (KA045491).*

5. THAT THE DISTRICT ATTORNEY RESCIND MY TRANSFER TO THE EL MONTE AREA OFFICE.

6. THAT THE DISTRICT ATTORNEY PROMOTE ME TO GRADE IV.

TO : FRANK SUNDSTEDT, HEAD DEPUTY, POMONA BRANCH
FROM : RICHARD CEBALLOS, DEPUTY DISTRICT ATTORNEY
DATE : MARCH 2, 2000
RE : PEOPLE V MICHAEL CUSKEY, RANDY LONGORIA, AND DOUGLAS OJALA

CASE NUMBER KA045491

THE ABOVE-NAMED DEFENDANTS ARE CHARGED WITH SEVERAL NARCOTIC AND WEAPON VIOLATIONS PURSUANT TO PENAL CODE SECTION 12021(A) AND HEALTH AND SAFETY CODE SECTION

11378 (NOTE: DEFENDANT OJALA HAS ALREADY PLED GUILTY AND IS CURRENTLY SERVING A ONE YEAR JAIL SENTENCE). THEIR ARRESTS CAME ABOUT AS A RESULT OF A SEARCH WARRANT EXECUTED ON THEIR PROPERTY ON OR ABOUT AUGUST 4, 1999.

A MOTION TO TRAVERSE THIS SEARCH WARRANT HAS BEEN FILED AND IS SET FOR HEARING ON MARCH 6, 2000 IN DEPT. E. THE MOTION ALLEGES THAT THE AFFIANT (LOS ANGELES COUNTY DEPUTY SHERIFF KEITH WALLS. INDUSTRY STATION) MADE STATEMENTS OR OMISSIONS OF FACT IN THE SEARCH WARRANT "THAT WERE DELIBERATELY FALSE OR IN RECKLESS DISREGARD OF THE TRUTH".

AFTER REVIEW OF THE CASE FILE AS WELL AS A PERSONAL VIEW OF THE LOCATION, I BELIEVE THAT FOR THE REASONS SET FORTH BELOW THAT THE DEFENSE MOTION TO TRAVERSE THE WARRANT HAS MERIT, AND I REQUEST PERMISSION TO DISMISS THE INFORMATION AGAINST DEFENDANTS CUSKEY AND LONGORIA PURSUANT TO PENAL CODE SECTION 1385. I ALSO REQUEST PERMISSION TO HAVE DEFENDANT OJALA'S SENTENCE RECALLED AND THE CASE AGAINST HIM DISMISSED IN THE LIKE MANNER.

DISCUSSION

ON AUGUST 3, 1999, LOS ANGELES COUNTY DEPUTY SHERIFFS SIMPKINS AND SPITULSKI OF THE INDUSTRY STATION OBSERVED A STRIPPED PICKUP TRUCK PARKED ON A RESIDENTIAL STREET (241

3RD ST) IN THE CITY OF BASSET. THE DEPUTIES CONTACTED DEPUTY KEITH WALLS OF THE AUTO THEFT DETAIL AND INFORMED HIM OF THEIR FINDINGS. DEPUTY WALLS WENT TO THE LOCATION TO VIEW THE PICKUP HIMSELF AND HE LATER CONFIRMED THAT THE PICKUP WAS INDEED STOLEN.

DEPUTY SIMPKINS AND SPITULSKI FURTHER ADVISED DEPUTY WALLS THAT THEY HAD OBSERVED "TIRE TRACKS WHICH APPEARED TO MATCH THE TREAD PATTERN" OF THE STOLEN TRUCK LEAD "TO A FENCE AT THE END OF A **LONG DRIVEWAY**" (EMPHASIS ADDED) THAT RAN EASTBOUND FROM THE STREET WHERE THE TRUCK WAS LOCATED. THEY FURTHER ADVISED DEPUTY WALLS THAT "THE TIRE TRACKS STOPPED AT THE ENTRANCE TO A FENCED-OFF PIECE OF PROPERTY" (WHICH HAPPENED TO BE DEFENDANT'S PROPERTY). IN ADDITION, THE DEPUTIES ADVISED DEPUTY WALLS THAT THEY HAD OBSERVED THREE (3) WHEELS AND TIRES INSIDE THE FENCED-OFF PROPERTY WHICH APPEARED TO MATCH THE WHEEL AND TIRE MOUNTED ON THE LEFT FRONT OF THE STOLEN PICKUP. THEY ALSO ADVISED DEPUTY WALLS THAT THE DIRT INSIDE THE FENCED IN AREA APPEARED TO HAVE BEEN "FRESHLY RAKED AND WATERED, AS WOULD BE INDICATIVE OF AN ATTEMPT TO DISGUISE FRESH TIRE TRACK". LASTLY, THEY ADVISED DEPUTY WALLS THAT THEY SAW A LARGE OBJECT INSIDE THE FENCE WHICH WAS COVERED WITH A TARP

THAT "APPEARED TO HAVE THE SAME DIMENSIONS" AS THE ENGINE THAT WAS REMOVED FROM THE STOLEN PICKUP.

BASED UPON THIS INFORMATION, DEPUTY WALLS SECURED A SEARCH WARRANT FOR THE DEFENDANTS' PROPERTY SEEKING EVIDENCE RELATING TO THE STOLEN PICKUP TRUCK. THE SEARCH WARRANT WAS PREPARED AND EXECUTED THE FOLLOWING DAY.

THE SEARCH, HOWEVER, FAILED TO UNCOVER ANY STOLEN AUTO PARTS, INCLUDING ANY PARTS FROM THE STOLEN PICKUP HOWEVER, WITH THE AID OF A DRUG SNIFFING CANINE, THE SEARCH DID UNCOVER SMALL AMOUNTS OF METHAMPHETAMINE AND SEVERAL FIREARMS ON THE PROPERTY.

THE PROBABLE CAUSE BASIS FOR THE SEARCH WARRANT WAS PRIMARILY BASED UPON ONE CRUCIAL OBSERVATION AND STATEMENT: I.E., THAT "TIRE TRACKS" FROM THE STOLEN TRUCK APPARENTLY LED TO THE DEFENDANT'S PROPERTY. WHILE DEPUTY WALLS DOES STATE THAT THE TIRE TRACKS ARE ALONG A **"LONG DRIVEWAY"** (AFFIDAVIT, PAGE 6, LINE 24). INVESTIGATION HAS REVEALED THAT HIS DESCRIPTION OR CHARACTERIZATION OF THIS ROADWAY IS GROSSLY INACCURATE.

IN REALITY, THIS SO-CALLED "DRIVEWAY" IS FOR ALL PRACTICAL PURPOSES A SEPARATE RESIDENTIAL STREET (ALTHOUGH IT IS NOT NAMED AS SUCH). THIS SO-CALLED "DRIVEWAY" IS APPROXIMATELY 300 FEET IN TOTAL LENGTH FROM DEFENDANTS

GATE TO 3RD STREET. WHERE THE STOLEN TRUCK WAS LOCATED. THE ROADWAY'S WIDTH, APPROXIMATELY 30 TO 40 FEET, APPEARS EQUAL TO IF NOT GREATER THAN A STANDARD RESIDENTIAL STREET. IN ADDITION, THERE ARE NO LESS THAN NINE (9) OTHER SEPARATE RESIDENCES AND PROPERTIES THAT EXIST ALONG THIS SO-CALLED DRIVEWAY, AND THESE RESIDENTS AND OWNERS MUST USE THIS ROADWAY IN ORDER TO REACH THEIR RESPECTIVE SEPARATE PROPERTIES. LASTLY, THIS SO-CALLED DRIVEWAY IS CONSTRUCTED OF A COMBINATION OF ASPHALT (BROKEN IN NUMEROUS PLACES), GRAVEL, AND DIRT. HOWEVER, THE ROADWAY DOES NOT APPEAR TO BE OF A NATURE CONDUCIVE TO MAINTAINING DISCERNABLE TIRE TRACKS ALONG ITS TOTAL LENGTH (ALTHOUGH TIRE TRACKS ARE MORE READILY DISCERNABLE TOWARDS THE END OF THIS ROADWAY NEAR THE GATE TO DEFENDANT'S PROPERTY). PHOTOGRAPHS OF THIS SO-CALLED DRIVEWAY AND THE SURROUNDING AREA ARE ATTACHED. A VIDEOTAPE OF THIS AREA HAS BEEN PREPARED BY DEFENDANT LONGORIA'S ATTORNEY AND HAS ALSO BEEN REVIEWED.

WHILE DEPUTY WALLS STATES IN HIS AFFIDAVIT THAT HE IS RELYING UPON THE OBSERVATIONS OF DEPUTIES SIMPKINS AND SPITULSKI, HE ACTUALLY WAS AT SOME POINT PRESENT AT THE LOCATION WHERE THE STOLEN PICKUP TRUCK WAS FOUND, AND ACCORDINGLY, HE WAS IN A POSITION TO SEE FOR HIMSELF THE PHYSICAL NATURE OF THIS ROADWAY. YET DESPITE THIS APPARENT AWARENESS, HIS AFFIDAVIT IS WORDED TO DESCRIBE THIS

ROADWAY SIMPLY AS A "LONG DRIVEWAY" BUT BY DESCRIBING THE ROADWAY IN THIS FASHION AND BY OMITTING ANY REFERENCE TO THE FACT THAT THIS ROADWAY IS APPROXIMATELY 300 FEET LONG AND IS USED BY OTHER RESIDENTS, THE MAGISTRATE WHO REVIEWED THE SEARCH WARRANT WOULD UNDOUBTEDLY BE LEFT WITH THE IMPRESSION THAT ONLY THE DEFENDANTS HAD ACCESS TO AND USED THIS ROAD TO ENTER AND LEAVE THEIR RESIDENCE. AND THEREFORE THE STOLEN PICKUP TRUCK HAD TO HAVE COME FROM THE DEFENDANT'S PROPERTY. IN SHORT, THE DEPUTY'S DESCRIPTION OR CHARACTERIZATION OF THIS ROADWAY AS SIMPLY A "LONG DRIVEWAY" IS CLEARLY MISLEADING.

FURTHERMORE, IT APPEARS UNLIKELY THAT THE DEPUTIES COULD ACTUALLY DISCERN VISIBLE TIRE TRACKS ALONG THE ENTIRE DISTANCE OF THIS ROADWAY OR EVEN ON THE ACTUAL STREET. I PERSONALLY DROVE ALONG A PORTION OF THIS SAME ROADWAY IN A SPORTS UTILITY VEHICLE AND I COULD NOT DETECT ANY TIRE TRACKS ON THE GROUND LEFT BY MY VEHICLE. NOW THERE ARE AREAS WHICH ARE COVERED BY A COMBINATION OF DIRT AND GRAVEL, MOSTLY TOWARDS THE BACK, WHERE TIRE TRACKS COULD BE SEEN, BUT IT WAS ALMOST IMPOSSIBLE TO ASCERTAIN IF THEY CAME FROM THE OTHER RESIDENTS WHO USE THIS ROAD. DEPUTY WALLS' DECISION TO RELY ON THE REPORTED OBSERVATIONS OF DEPUTY SIMPKINS AND SPITULSKI IN THIS REGARD, WITHOUT ATTEMPTING TO VERIFY THE SAME, IS

SIGNIFICANT AND COULD LEAD TO THE CONCLUSION THAT THE TIRE TRACKS NEVER EXISTED AT ALL. WHEN I INFORMED DEPUTY WALLS OF THE DEFENSE MOTION AND SPECIFIC ALLEGATION THAT THE DEPUTIES HAD LIED TO HIM ABOUT SEEING TIRE TRACKS, HIS RESPONSE WAS "WELL, THAT'S WHAT THEY TOLD ME."

IN ACCORDANCE WITH **FRANKS V. DELAWARE** (1978) 438 U.S. 154, THE ABOVE REFERENCED MISREPRESENTATIONS AND OMISSIONS OF FACTS WERE NO DOUBT SIGNIFICANT IN THAT HAD THE MAGISTRATE WHO SIGNED THE WARRANT BEEN MADE AWARE OF THE TRUE AND FULL FACTS. IT IS UNLIKELY THAT HE WOULD HAVE SIGNED THE WARRANT AT ALL. IT IS UNK[N]OWN WHETHER SAID MISREPRESENTATIONS AND OMISSIONS WERE DONE DELIBERATELY OR IN RECKLESS DISREGARD OF THE TRUTH.

CONCLUSION

BECAUSE IT APPEARS THAT THE AFFIDAVIT WAS INCOMPLETE AND INACCURATE CONCERNING ALL OF THE FACTS AS THEY EXISTED, THE SEARCH WARRANT SHOULD BE QUASHED. THE AFFIDAVIT'S REMAINING CONTENT IS INSUFFICIENT TO JUSTIFY A CONTINUED FINDING OF PROBABLE CAUSE, AND THERE IS NO REMAINING EVIDENCE SUFFICIENT TO SUSTAIN A CONVICTION AGAINST EITHER DEFENDANT.

ACCORDINGLY, THE CHARGES AGAINST DEFENDANT CUSKEY AND DEFENDANT LONGORIA SHOULD BE DISMISSED PURSUANT TO PENAL

CODE SECTION 1385. IN ADDITION, THE SENTENCE PREVIOUSLY IMPOSED UPON DEFENDANT OJALA SHOULD BE RECALLED AND HIS CASE LIKEWISE DISMISSED.

TO : FRANK SUNDSTEDT, HEAD DEPUTY,
POMONA BRANCH
FROM : RICHARD CEBALLOS, DEPUTY
DISTRICT ATTORNEY [/s/ RC]
RE : PEOPLE V CUSKEY, ET AL
CASE NUMBER KA045491
DATE : MARCH 6, 2000

ADDENDUM TO MEMO, DATED MARCH 2, 2000

ON MARCH 3, 2000 AT APPROXIMATELY 2:15 P.M., I RECEIVED A TELEPHONE CALL FROM DETECTIVE KEITH WALLS IN REGARDS TO THE ABOVE-MENTIONED CASE, I INFORMED HIM THAT THE CASE WOULD LIKELY BE DISMISSED BECAUSE OF PROBLEMS ASSOCIATED WITH THE SEARCH WARRANT. SPECIFICALLY, I INFORMED HIM THAT HIS USE OF THE WORD "DRIVEWAY" IN THE WARRANT WAS GROSSLY INACCURATE AND WOULD UNDOUBTEDLY LEAD TO AN UNFAVORABLE RULING ON THE PENDING MOTION TO TRAVERSE. HE STATED THAT HE THOUGHT THAT I WAS BEING "TOO HYPER TECHNICAL" IN THIS REGARD.

I ALSO INFORMED HIM THAT I HAD PERSONALLY VIEWED THE LOCATION OF THE SEARCH WARRANT, AND THAT I HAD DIFFICULTY BELIEVING THAT DISCERNABLE TIRE TRACKS COULD

ACTUALLY BE SEEN ALONG THE ENTIRE LENGTH OF THIS ROADWAY. HE THEN STATED THAT AFTER SPEAKING WITH THE DEPUTIES (SIMPKINS AND SPITULSKI) THAT THE WORDING OF THE WARRANT SHOULD BE "MODIFIED" TO STATE THAT THEY OBSERVED "TIRE GOUGES", CAUSED BY THE RIMS OF THE STOLEN TRUCK SCRAPING ALONG THE ROADWAY, AND NOT "TIRE TRACKS", AS STATED IN THE AFFIDAVIT. I ASKED HIM WHEN HE AND THE DEPUTIES DECIDED TO "MODIFY" THIS DESCRIPTION, BUT HE DID NOT RESPOND. THIS CONCLUDED OUR CONVERSATION.

Attorney or Party Without Attorney (Name and Address)	Telephone No.	For Court Use Only
RICHARD ESCOBEDO ESCOBEDO & ESCOBEDO Attorneys at Law 11401 E. Valley Boulevard, Suite 214 El Monte, CA 91731 Attorney for (Name):	(626) 339-3705	
Insert name of court, judicial district or branch court, if any, and post office and street address SUPERIOR COURT OF CALIFORNIA EAST 400 Civic Center Plaza same Pomona, California 91766		
Title of Case: PEOPLE OF THE STATE OF CALIFORNIA VS. RANDY LONGORIA		
SUBPENA (CRIMINAL OR JUVENILE, ☐ **DUCES TECUM**		Case Number: KA045491-02

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (NAME): Deputy District Attorney RICHARD CEBALLOS

1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below UNLESS you make a special agreement with the person named in item 3:

a. Date: 03/16/00 Time: 8:30 a.m. ☒ Dept.: ☐ Div.: ☐ Room:
b. Address: 400 Civic Center Plaza Pomona, CA 91766

2. AND YOU ARE

   a. ☒ ordered to appear in person.

   b. ☐ not required to appear in person if you produce the records described in the accompanying affidavit and a completed declaration of custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose your original declaration with the records. Seal them. (2) Attach a copy of this subpena to the envelope or write on the envelope the case name and number, your name and date, time, and place from item 1 (the box above). (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party shown at the top of the form.

   c. ☐ ordered to appear in person and to produce the records described in the accompanying affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records is required by this subpena. The procedure authorized by subdivision (b) of

section 1560, and sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpena.

d. ☐ ordered to make the original business records described in the accompanying affidavit available for inspection at your business address by the attorney's representative and to permit copying at your business under reasonable conditions during normal business hours.

3. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:

a. Name: RICHARD ESCOBEDO Attorney at Law b. Telephone Number 626.339.3705

4. **WITNESS FEES:** You may be entitled to witness fees, mileage, or both, in the discretion of the court. Contact the person named in item **3 AFTER** your appearance.

DISOBEDIENCE OF THIS SUBPENA MAY BE PUNISHED BY A FINE, IMPRISONMENT, OR BOTH. A WARRANT MAY ISSUE FOR YOUR ARREST IF YOU FAIL TO APPEAR.

For Court Use Only	Date: 03/14/00 ▶ /s/ Richard Escobedo (SIGNATURE OF PERSON ISSUING SUBPENA) RICHARD ESCOBEDO (TYPE OR PRINT NAME) Attorney at Law (TITLE)

Law Office of Escobedo & Escobedo
RICHARD ESCOBEDO, Esq. SBN #145271
11401 E. Valley Blvd., Ste. 214
El Monte, CA 91731
(626) 339-3705

Attorney for Defendant RANDY LONGORIA

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. RANDY LONGORIA, Defendant	CASE NO. KA045491-02 POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR HEARING TO TRAVERSE WARRANT

MEMORANDUM OF POINTS AND AUTHORITIES

I

THE DEFENDANT IS ENTITLED TO CONTROVERT FACTUAL STATEMENTS CONTAINED IN AN AFFIDAVIT IN SUPPORT OF A WARRANT

Penal Code Section 1539 provides in part:

> "(a) If a special hearing be held in the superior court pursuant to Section 1538.5, or if the grounds on which the warrant is issued be controverted and a motion to return property be made . . . , the judge or magistrate must proceed to take testimony in relation thereto. . . ."

Penal Code Section 1540 provides in part:

> "If it appears that the property taken is not the same as that described in the warrant, or that there is not probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

In *Franks v. Delaware*, (1978) 438 U.S. 154, 57 L Ed 2d 667, 98 S Ct 2674, the United States Supreme Court held that a defendant may challenge the veracity of a facially valid warrant affidavit upon a specific primary showing the: 1) the affiant made statements that were deliberately false or in reckless disregard of the truth; and 2) the affidavit's remaining content is insufficient to justify a finding of probable cause. The *Franks* court stated the guiding principle as follows:

> " . . . where the defendant makes a substantial preliminary showing that a false statement knowingly or intentionally, or with reckless disregard for the truth, was included by the affiant

> in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Frank v. Delaware* (1978) 438 US 154, 155-156, 57 L Ed 2d 667, 98 S Ct 2674.)

The rule of *Franks* is applicable to "affidavits marred by omissions of facts. . . ." (*United States v. Lefkowitz* (1980), CA 9 Cal) 618 F2d 1313, 1317 n 4., 80-2 USTC P 9722, 45 AFTR 2d 80-1627.)

In the case at bar, a vehicle was found on the street in an unincorporated portion of Los Angeles county. This area is known as Basset. The particular street (Third) is located in an area the borders and industrial park and residential homes. It is with regular occurrence that stolen vehicles are abandoned in this area and it is considered a high crime area only being one block south of Valley Boulevard. Los Angeles County Sheriff Deputies SIMPKINS and SPITULSKI observed that the truck was missing its engine and doors and it was readily apparent that the truck had been stripped for parts and was in all likelihood stolen. According to the search warrant affidavit written by supervising L.A.C.S. Deputy K. WALLS, the two Deputies "saw tire tracks leading back to a fence at the end of a long driveway that ran E/B from the east side of 3rd street. The tire tracks appeared to match the tread pattern of the tires currently mounted on the truck." In actuality, the so called "driveway" is a private road that is approximately 25 feet wide and approximately 200 feet long. Approximately 6-8 residential homes border the road. The occupants of these homes use this road daily for access to their homes. More importantly, this road surface consists of asphalt, gravel and broken asphalt. Given the dry condition of the road in

August, it would very unlikely that one could trace tire tracks 200 feet over an asphalt and gravel road surface that is traveled over numerous times a day by 10-12 various vehicles.

II

IF THE BURDEN ON THE DEFENDANT TO ESTABLISH THAT MISSTATEMENTS IN THE AFFIDAVIT ARE INTENTIONAL OR RECKLESS IS BY PREPONDERANCE OF THE EVIDENCE

In *People v Cook* (1978) 22 Cal 3d 67, 89, 90-19, 148 Cal Rptr 605, 583 P2d 130, the California Supreme Court held that the burden on the defendant of establishing that misstatements in the affidavit are intentional is by a preponderance of the evidence.

> "[W]hen the defendant charges that the misstatements were deliberate, i.e., that the affiant knew they were false at the time he made them[,] . . . the defendant should retain both the burden of producing evidence of the affiant's knowledge of falsity (Evid. Code, Sec. 550) and the ultimate burden of proof on that issue (Evid. Code, Sec. 500).
>
> "[T]he defendant need only prove the affiant's knowledge by a preponderance of the evidence. . . .
>
> "[A] sworn misstatement made with conscious indifference to whether it is true or false is deemed the equivalent of an allegation actually known to be untrue. . . .

> "[I]t is not necessary to further prove the affiant made the allegations with the specific intent to deceive the magistrate."

In this matter, the Deputies stated that they observed 3 white spoke-type wheels and tires and a truck liner on the property at the end of a "driveway". What the Deputies failed to mention was that the property behind the fence is littered with hundreds of vehicle parts. When the search warrant was executed, several vehicle parts were seized, but none matching the stolen vehicle. The Deputies were on a "fishing expedition" and took advantage of the opportunity provided by the discovered stolen truck to obtain a search warrant. One must ask why would law enforcement officers when executing a search warrant seeking stolen vehicle parts come prepared with a trained narcotic sniffing canine.

III

INTENTIONAL OR RECKLESSLY FALSE AVERMENTS IN THE AFFIDAVIT MUST BE EXCISED AND THE REMAINING PARTS OF THE AFFIDAVIT RETESTED FOR PROBABLE CAUSE

In *People v Cook* (1978) 2 Cal 3d 67, 87, 148 Cal Rptr 605, 583 P2d 130, the Supreme Court explained the procedure to be followed upon the finding of intentionally false averment in an affidavit in support of a warrant:

> "[A]lthough the court can excise the intentionally false allegations it cannot presume the remainder to be true. Lacking a reliable factual basis in the affidavit, the court has no alternative under settled constitutional principles but

* * *

A warrant is invalid if, after the false statements are excised, the affidavit's remaining content is insufficient to establish probable cause.

Without the statements concerning the "tire tracks" leading to the property in question, there is no other connection between the stolen truck and the property.

DEFENDANT ASKS PERMISSION TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES AFTER THE HEARING ON THIS MOTION

Defendant requests permission to file a supplemental memorandum of points and authorities after the hearing on this motion, to address the testimony at the hearing and the prosecution's arguments. Enclosed is copy of the search warrant affidavidt [sic] in question.

CONCLUSION

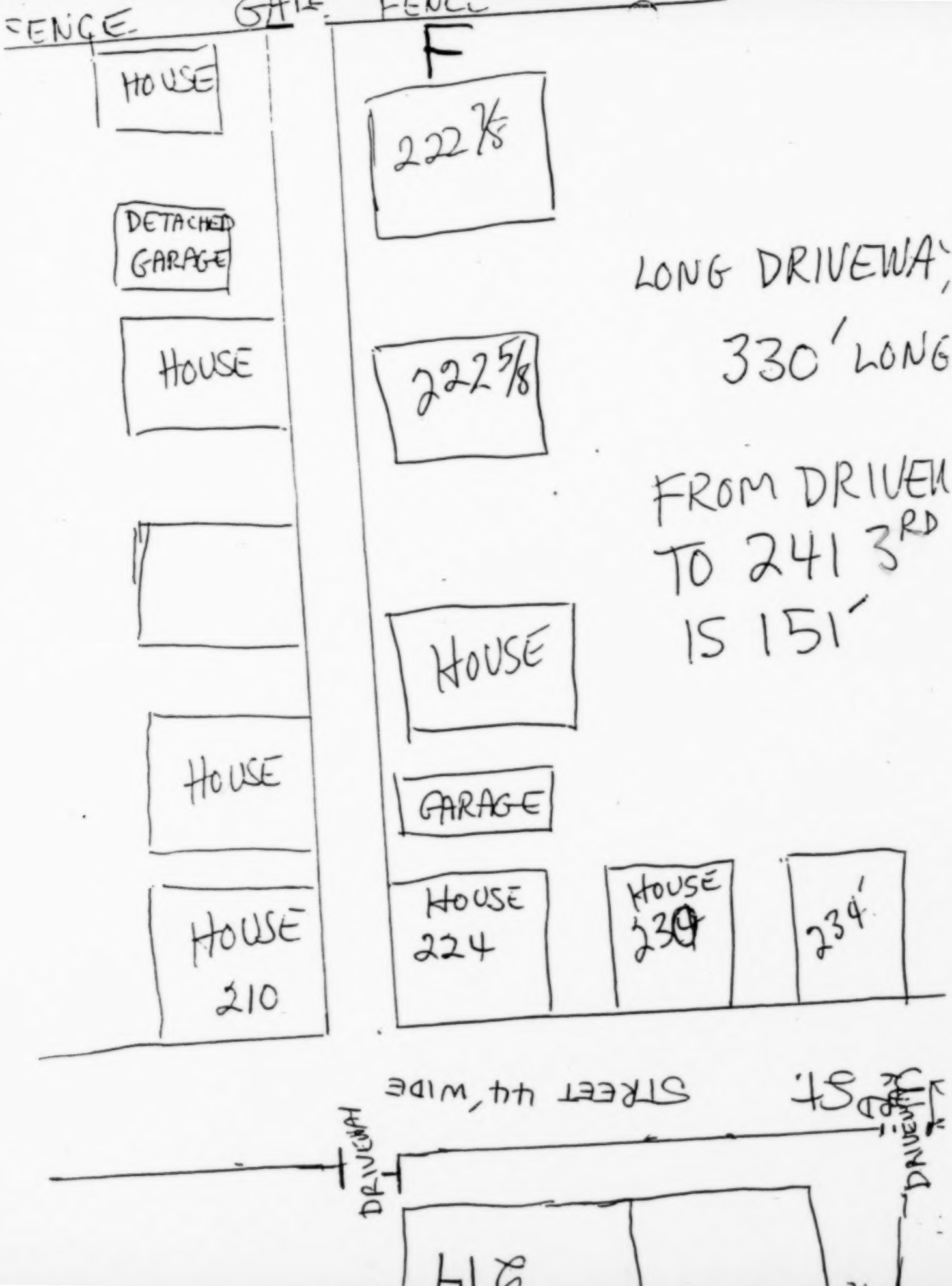
Based on the foregoing, the defense requests that this Court find the statements discussed above to be deliberately false, or made in reckless disregard of the truth, to find that what remains in the affidavit after excising the false statements is insufficient to support a finding of probable cause, and that the court quash the warrant issued August 4, 1999 by Judge T. Falls, and suppress all evidence seized under the authority of that warrant.

DATED: December 10, 1999

Respectfully submitted,

Law Offices of Escobedo & Escobedo

By: /s/ Richard Escobedo
RICHARD ESCOBEDO
Attorney for RANDY LONGORIA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DEPARTMENT OF THE DISTRICT ATTORNEY
GRIEVANCE RESPONSE FORM

LEVEL 2

Employee Name RICHARD CEBALLOS
Position Deputy District Attorney III

Level 2 Supervisor GEORGE KNOKE
Position Director, Branch & Area, Ops., Reg. II

Date Grievance Form received at Level 2 September 8, 2000

Summary of Facts (attach additional sheets as needed):

Decision (attach additional sheets as needed):

On September 5, 2000 Richard Ceballos filed a grievance against Frank Sundstedt, Head Deputy of the Pomona Branch, and Carol Najera, Assistant Head Deputy of that Branch. The first level meeting was bypassed upon the request of Mr. Ceballos.

I, as Director of Branch and Area Operations, Region II, was determined to be the appropriate person to handle the second level of the grievance, being the immediate supervisor over the Pomona Branch.

The nature of the grievance can be summarized as follows:

1. That Frank Sundstedt and Carol Najera deliberately, willfully and intentionally engaged in harassment, retaliation and reprisal against Mr. Ceballos as the result of his reporting that certain police officers may have fabricated probable cause to obtain a search warrant in the case of *People v. Michael*

Cuskey, et al, KA045491, and his having testified at a Penal Code Section 1538.5 hearing in that case.

2. That Carol Najera attempted to dissuade Mr. Ceballos from testifying at the hearing.

3. That Frank Sundstedt and Carol Najera created and maintained a hostile work environment for Mr. Ceballos as a result of his actions in the above case.

4. That Frank Sundstedt and Carol Najera demoted Mr. Ceballos from Calendar Deputy to that of trial deputy as a result of his actions in the above case.

5. That Frank Sundstedt and Carol Najera reassigned a murder case previously assigned to him as a result of his actions in the above case.

6. That Frank Sundstedt and Carol Najera refused to assign Mr. Ceballos new murder cases as a result of his actions in the above case.

7. That Frank Sundstedt and Carol Najera transferred Mr. Ceballos to the El Monte Area Office as a result of his actions in the above case.

Mr. Ceballos also alleged that Frank Sundstedt and Carol Najera willfully and maliciously influenced the decision to deny him a Grade IV promotion as a result of his actions in the above case. It was determined that this allegation was not a proper subject matter of the grievance procedure and was not considered or addressed by me.

On September 20, 2000 I held a meeting with Mr. Ceballos. Mr. Ceballos appeared along with Dinko Bozanich, acting as his employee representive. Also in attendance was Steve Sowders, Head Deputy of the Employee relations Division. Upon agreement of all parties, the meeting was tape-recorded.

The events forming the basis for the grievance will be set forth in chronological order, I interviewed Frank Sundstedt and Carol Najera in Pomona on September 25, 2000. I am inserting their comments concerning these events as they unfold. These statements are in italics. I have inserted some comments of my own that did not result from interviews. These are in Bold.

At the meeting with me, Mr. Ceballos presented verbally that which is set forth in his written grievance. The triggering event, according to Mr. Ceballos, was the submission of a memo on or about March 2, 2000, (a copy of this memo is attached as Exhibit 1 to his Grievance) to Frank Sundstedt indicating his belief that certain police officers had fabricated probable cause in order to obtain a search warrant. Mr. Ceballos requested permission to dismiss the case.

Prior to that time he had worked under Frank Sundstedt for approximately two years and had been made, as a Grade III, a Calendar Deputy, a normal Grade IV position, by Frank Sundstedt, a position he has occupied for at least one year prior to this memo being submitted to Frank Sundstedt.

Mr. Sundstedt recalls that Mr. Ceballos presented a memo, which contained many "conclusionary" statements. He suggested that the memo be rewritten since he intended to send it to the Sheriff's Department. The memo attached to

the grievance is the second or rewritten memo. It was this second memo which was sent to Captain Binkley of the Sheriff's department.

It was Mr. Ceballos' impression that Frank Sundstedt agreed with his inclusion because Mr. Sundstedt told him to see that a co-defendant in that case, who had already been sentenced to jail time as a condition of probation, be released from custody. *Mr. Sundstedt stated he was considering dismissal of the case, and directed that this defendant be released from custody pending a determination of the issues presented in Mr. Ceballos' memo. It was Mr. Sundstedt's feeling that this defendant should not remain in custody if there was a basis, in fact, for the conclusions drawn by Mr. Ceballos. It was his intention to investigate the matter further. Mr. Sundstedt agreed to a meeting with representatives of the Sheriff's Department to get more information concerning the information in the Ceballos memo.*

On or about March 9, 2000 a meeting was held in Frank Sundstedt's office attended by Frank Sundstedt, Carol Najera, Deputy District Attorney Steve Gallon, the deputy who had handled the *Cuskey* case before Mr. Ceballos became involved with it and who visited the location in controversy in the *Cuskey* case with Mr. Ceballos, Captain Binkley and Lieutenant Barstow of the Industry Station, and Deputy Sheriff Keith Walls, the affiant of the search warrant in question.

Mr. Ceballos states that during the meeting he was verbally attacked by Lieutenant Barstow and that neither Frank Sundstedt or Carol Najera did anything to stop or interrupt this attack. He states Ms. Najera told him during the meeting not to say anything and to just listen.

Ms. Najera denies having said this. Mr. Sundstedt characterized the meeting as a "heated discussion" between Deputy Walls and himself. He does not recall Mr. Ceballos saying anything during the meeting. He stated there was no criticism of Mr. Ceballos.

Deputy District Attorney Steve Gallon appeared at the second level interview with me at the request of Mr. Ceballos. Dinko Bozanich questioned him. He didn't recall who invited him to attend the meeting on March 9, 2000. *Mr. Sundstedt and Ms. Najera stated they did not invite Deputy Gallon to attend the meeting. They felt his attendance was requested by Mr. Ceballos.* He recalled no specifics of the meeting. He stated that nothing at the meeting was remarkable or memorable.

According to Mr. Ceballos, Captain Binkley expressed a concern that a civil case would be filed against the Sheriff's Department should the case be dismissed and that a civil rights suit had been filed by Mr. Cuskey against one of the deputies involved. Mr. Ceballos felt that the civil rights suit against the deputy should have been revealed to the magistrate signing the warrant.

A motion to traverse the warrant had been filed by the defense. Mr. Ceballos states that at the conclusion of the meeting Frank Sundstedt informed Captain Binkley that the People would proceed with the hearing on the motion to traverse the warrant. *Mr. Sundstedt states that he told the representative of the Sheriff's department he would get back to them.*

After the meeting Mr. Ceballos asked Mr. Sundstedt why he had reversed himself and told him that it appeared he was "kowtowing" to the Sheriff's Department. *Mr. Sundstedt states that this conversation did not occur.*

Mr. Sundstedt states that after the meeting he conferred with Ms. Najera. It was determined that the hearing on the motion to traverse should be held to see how the officers would testify under oath. Mr. Sundstedt asked Ms. Najera to handle the hearing.

The motion to traverse was set for March 20, 2000. On or about March 14, 2000 Mr. Ceballos informed Mr. Sundstedt and Ms. Najera that he had been subpoenaed as a witness by the defense.

Before that hearing an issue arose as to what material should be turned over to the defense in the way of discovery. Mr. Ceballos felt portions of his original memo of March 2, 2000 together with an addendum dated March 6, 2000 containing statements made by Deputy Walls should be turned over to the defense. According to Mr. Ceballos Ms. Najera instructed him to write a new memo omitting everything except the statements made to him by Deputy Walls, and omitting his own observations of the scene. Mr. Ceballos told Ms. Najera the proper way to proceed was to redact the work product in the memos. According to Mr. Ceballos, Ms. Najera became incensed, told him he was wrong and ordered him to prepare a new memo. Mr. Ceballos told Ms. Najera she was wrong, and he would not do as she ordered.

Ms. Najera stated when the issue arose she consulted George Palmer who suggested that a redacted version was the proper approach. Ms. Najera denies that there was the discussion described by Mr. Ceballos, or that she ordered him to prepare a new memo.

Mr. Ceballos describes a meeting with Ms. Najera on or about March 16, 2000. At that meeting the issues concerning the motion to traverse were discussed and Ms. Najera

told Mr. Ceballos that his assessment of the facts was wrong. Mr. Ceballos reiterated his position and stated that he would state his opinion that the affidavit for the search warrant contained fabrications. Mr. Ceballos stated that Ms. Najera stated, "If you keep thinking like that . . . talking like that, you're going to get yourself in trouble with this office". Mr. Ceballos felt this was an attempt to dissuade him from testifying.

Ms. Najera recalls some conversations concerning the issues with Mr. Ceballos, and questioned his analysis. She denies having ever made the statement quoted above attributed to her by Mr. Ceballos. She denied ever having attempted to dissuade Mr. Ceballos from testifying.

Section 26540 of the Government Code provides:

"A district attorney shall not during his incumbency defend or assist in the defense of, or act as counsel for, any person accused of any crime in any county."

This section applies to Deputy District Attorneys.

On March 20, 2000 the motion to traverse the warrant was heard. **A copy of the affidavit in question is attached.**

In order to understand the issues I will summarize the disputed issues. A stripped truck was discovered on an asphalt street. One of the wheels had a flat tire with the rim overriding the tire. Running perpendicular to this street, a short distance from where the truck was found, is an "access road" (my terminology) which ends at the defendant's property. This "access road" is partially asphalt and partially dirt. The dirt portion is the closest to the

defendant's property. Other dwellings adjoin the "access road". The affidavit describes this "access road" as a driveway.

The affidavit further states, "The above deputies attempted to locate where this vehicle came from. They saw tire tracks leading back to a fence at the end of a long driveway that ran E/B from the east side of 3rd St. The tire tracks appeared to match the tread pattern of the tire currently mounted on the truck."

Mr. Ceballos in his memo dated March 2, 2000 characterizes this "access road" as a "roadway" available to other residents and that reference to it as a "driveway" was misleading. He also stated in his memo, "Furthermore, it appears unlikely that the Deputies could actually discern visible tire tracks along the entire distance of this roadway or even on the actual street." This conclusion was based on his personal observation of the scene.

Deputy District Attorney Steven Gallon accompanied Mr. Ceballos when he examined the scene. Upon being questioned by Mr. Bozanich on September 20, 2000 Mr. Gallon stated that he could not conclude from his observations when he accompanied Mr. Ceballos to the scene in March, 2000 whether tire tracks would have been visible on August 3, 1999.

I have read the entire transcript of the motion to traverse, a copy of which is attached. It consists of 151 pages. Ms. Najera's questioning of Mr. Ceballos covers four pages, page 96 through page 99.

Mr. Ceballos states that Ms. Najera allowed Deputy Walls to remain in the courtroom seated next to her during the hearing. *Ms. Najera states that is true, because he was the*

investigating officer. Mr. Ceballos stated she treated him as if he was a "hostile witness" and became upset at some of his responses. *Ms. Najera admits she became exasperated because Mr. Ceballos was not answering the questions asked.* The transcript speaks for itself.

Mr. Ceballos states that after the meeting Ms. Najera called him into her office and told him she had wanted to shut him up. *Ms. Najera denies this.*

The court denied the motion to traverse. The court's reasoning is set forth in the transcript, pages 137 through 141. Part of the basis of this conclusion was videotape of the scene introduced into evidence by the defense. This tape, according to the court, clearly shows tread marks in the location described by the observing deputies. A discussion of this appears on pages 84 and 104 through 106 of the transcript.

The Court determined the term "driveway" was not misleading (pages 102 through 104 of the transcript). On pages 138 and 139 of the transcript the judge states, " . . . they saw tire tracks leading back to a fence at the end of a long driveway. And I don't know why you are disturbed about the word, driveway, Mr. Escobedo."

The defendant who had been released from custody was present at the hearing. At the conclusion of the hearing Ms. Najera asked that he be remanded to custody. The court changed the condition of probation to "time served", and ordered this defendant to report to the probation department.

At some time after the hearing Mr. Sundstedt stated that Mr. Ceballos came to his office and stated that he "didn't know where he stood". Mr. Sundstedt stated to him that he was glad Mr. Ceballos had brought the matter to his attention, and everything was fine. After that Mr. Sundstedt states he gave no further thought to the case.

In his grievance Mr. Ceballos states that Mr. Sundstedt and Ms. Najera "demoted me from the position of Calendar Deputy to that of trial deputy". As stated above, Mr. Ceballos had been a calendar deputy for at least a year preceding the events enumerated in his grievance.

Mr. Sundstedt states that prior to April 10, 2000 the Pomona Branch had four calendar courts. Two courts had Grade IV calendar deputies, and two courts Grade III calendar deputies, one of which was Mr. Ceballos. On April 10, 2000 two calendar courts were eliminated. Mr. Sundstedt decided that the two remaining courts should have two calendar deputies each. On April 7, 2000 Mr. Ceballos was placed as co-calendar deputy with Deputy Michael Grosbard in Department N. This is born out by the memo from Michael Grosbard, attached, which was submitted by Mr. Ceballos.

Mr. Sundstedt also stated that filing deputy positions were always difficult to staff. He attempted to rotate deputies through these positions for six-month periods. Kathleen Cady, a Grade III deputy at the time had been filling one filing deputy position. He stated it was understood that Mr. Ceballos was next in line to fill a filing position for a six-month period. When Ms. Cady's time was up, Mr. Ceballos was the next in line to file for a six-month period. However, at that time, he became aware of a trial deputy whose pregnancy prevented her continuing to do court duty. She

was assigned the filing position, giving Mr. Ceballos a reprieve.

Mr. Sundstedt stated that Ms. Cady was made co-calendar deputy with Michael Grosbard because she needed experience in running a calendar. **Ms. Cady was transferred from the Family Violence Division to Pomona on April 5, 1999. She had been in the Family Violence Division since October 1994. I do not believe she had ever been a felony calendar deputy before. It was at this time that Mr. Ceballos continued as a trial deputy in that court. Attached is an assignment roster dated July 12, 2000 showing this status.**

Mr. Ceballos states that on August 28, 1999 Ms. Najera gave him a choice of filing misdemeanors in Pomona, or to be transferred to El Monte as a felony-filing deputy. Mr. Ceballos refused to choose. He felt filing misdemeanors was not suitable for one with his experience, and that transfer to El Monte would require a longer commute. **Mr. Ceballos lives in Pomona.** Since Mr. Ceballos did not choose, Ms Najera transferred him to El Monte effective September 5, 2000. Mr. Ceballos felt this was punitive in nature.

Mr. Sundstedt stated that misdemeanor filings in Pomona were getting behind because of a part-time deputy handling them. It was his intention to Transfer Debra Scott, another part-time deputy, from El Monte to handle misdemeanor filings. That would leave only Deputies Jaime Corral and Eugene Hanks in El Monte as filing deputies. Mr. Hank's duties were limited to filing misdemeanors. He felt the Deputy in Charge was filing too much, and needed to devote more time to supervision of new deputies assigned to that office. He also felt that two felony-filing deputies

would then be required. Since Mr. Ceballos was next in line to be rotated into a filing position, he felt he should be transferred to El Monte as a felony-filing deputy. He turned the filing deputy assignments over to Ms. Najera. He felt that the only reason Ms. Najera gave Mr. Ceballos a choice in assignments was to be nice to him since he lived close to the courthouse in Pomona.

Ms. Najera states that she did give Mr. Ceballos a choice of assignments, but only because those were the two vacancies required to be filled.

Mr. Sundstedt pointed out that while in El Monte Mr. Ceballos took over the duties of Early Disposition Deputy while Grade IV Harold Hofman was on vacation.

Mr. Ceballos states in his grievance that Frank Sundstedt and Carol Najera reassigned a murder case previously assigned to him as the result of his actions previously described. *Mr. Sundstedt stated a number of Grade II deputies were to be transferred to the Juvenile Division shortly, and he wanted them to experience the trial of a murder case before their departure. Mr. Sundstedt stated he did not feel Mr. Ceballos objected to the transfer of the case at the time. Ms. Najera stated she was instructed to find a murder case for a Grade II deputy to try before being transferred to Juvenile. It was her recollection that Mr. Ceballos had one case that could be reassigned to a Grade II, and that she reassigned the case.*

Mr. Ceballos also states that for the same reasons he was assigned no new murder cases after testifying at the hearing on the motion to traverse, although they were assigned to less experienced deputies. **Between the time of the hearing on the motion to traverse, March 20, 2000, and the transfer of Mr. Ceballos to El Monte,**

September 5, 2000 there were only four murder informations filed in Pomona. During that period there were 13 trial deputies to whom murder cases could have been assigned. *Mr. Sundstedt denied there had been any effort to deprive Mr. Ceballos of assignment of murder cases.*

Mr. Ceballos also states in his grievance that as a result of the position he had taken in the *Cuskey* matter, Frank Sundstedt and Carol Najera created and maintained a hostile work environment for him. Mr. Grosbard in his memo stated that Ms. Najera ignored Mr. Ceballos in the hallways and was "giving him the silent treatment". Mr. Grosbard stated that Mr. Sundstedt began displaying the same attitude. *Mr. Sundstedt denied this allegation and stated that he noticed that Mr. Ceballos appeared to be avoiding him. Mr. Ceballos would have other deputies drop his files off in Mr. Sundstedt's office rather than doing it himself as he had done on previous occasions. Ms. Najera also denied this allegation, and stated she in fact had gone to and spoken at Mr. Ceballos' farewell luncheon. Mr. Sundstedt is expecting the return of Mr. Ceballos to Pomona at the end of his six-month filing period.* **Mr. Sundstedt approved time off for Mr. Ceballos to attend an out of state seminar from June 3, 2000 to June 10, 2000 with full salary.**

Mr. Ceballos submitted for my consideration a memo from Deputy Michael Grossbard and a letter from one of the defense attorneys, Richard Escobedo. Both are attached. In addition he requested in writing that I interview Sharon Fox, the court reporter of the hearing on the motion to traverse, Geoffrey Pope, defense attorney for Mr. Cuskey, and Judge Milton, the hearing magistrate on the motion to traverse the warrant.

I went to Pomona to attempt to interview Sharon Fox and Judge Milton. Ms. Fox was unavailable and was not interviewed. Judge Milton felt it was inappropriate for him to comment in any way; so he was not interviewed. I did not make any attempt to interview Geoffrey Pope.

At the conclusion of the interview I asked Mr. Ceballos if he still wanted to return to the Pomona Branch. He replied in the affirmative.

I find that neither Frank Sundstedt nor Carol Najera engaged in harassment, retaliation or reprisal against Mr. Ceballos as the result of his reporting that certain police officers may have fabricated probable cause to obtain a search warrant in the case of *People v. Michael Cuskey*, et al, KA045491, and his having testified at a Penal Code Section 1538.5 hearing in that case.

I find that the complaint that Carol Najera attempted to dissuade Mr. Ceballos from testifying at the above hearing is unfounded.

I find that neither Frank Sundstedt nor Carol Najera created or maintained a hostile work environment for Mr. Ceballos as result of his actions taken in the above case.

I find that neither Frank Sundstedt nor Carol Najera demoted Mr. Ceballos from Calendar Deputy to that of trial deputy as a result of his actions in the above case.

I find that neither Frank Sundstedt nor Carol Najera reassigned a murder case previously assigned to him as a result of his actions in the above case.

I find that neither Frank Sundstedt nor Carol Najera refused to assign Mr. Ceballos new murder cases as a result of his actions in the above case.

I find that neither Frank Sundstedt nor Carol Najera transferred Mr. Ceballos to the El Monte Area Office as a result of his actions in the above case.

Therefore, this grievance is denied.

Date Grievance Form and Level 2 Response returned to employee: 10/05/00 by U.S. Mail

Signature of Level 2 Supervisor: George Knoke

Supervisor's name typed or printed: George Knoke
Position Director, Branch & Area Ops., Region II

CINDY S. LEE, State Bar No. 168941
JIN S. CHOI, State Bar No. 180270
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, California 91101-3005
Telephone No. (626) 304-7830
Facsimile No. (626) 795-7460

Attorneys for Defendants
GIL GARCETTI, FRANK SUNDSTEDT,
and CAROL NAJERA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD CEBALLOS,
Plaintiff,
vs.
GIL GARCETTI, individually, and in his Official Capacity, FRANK SUNDSTEDT, Individually, and in his Official Capacity, CAROL NAJERA, Individually and in her Official Capacity, COUNTY OF LOS ANGELES, A Municipal Corporation, and DOES 1 THROUGH 10, Inclusive,
Defendants.

) Case No.
) CV 00-11106 AHM (AJWx)
) Honorable A. Howard Matz
) **DECLARATIONS OF FRANK SUNDSTEDT, DON CLEM, NANCY DUKELLIS AND AMY (KUHNERT) GLAUDINI IN SUPPORT OF DEFENDANTS' REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF INDIVIDUAL ISSUES**
) **[Reply to Opposition to Motion for Summary Judgment Or, Alternatively, Summary Adjudication; and**

) **Defendants' Objections to Plaintiff's Evidence filed concurrently herewith]**
) Date: January 28, 2002
) Time: 10:00 a.m.
) Courtroom: 14

Defendants GIL GARCETTI, CAROL NAJERA and FRANK SUNDSTEDT submit the following Declarations of Frank Sundstedt, Don Clem, Amy (Kuhnert) Glaudini and Nancy Dukellis in support of their Reply to Opposition to Motion for Summary Judgment, or in the Alternative, for Summary Adjudication.

DATED: January 22, 2002 FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE

By /s/ Jin S. Choi FOR
Cindy S. Lee
Attorneys for Defendants
GIL GARCETTI, FRANK SUNDSTEDT, and CAROL NAJERA

DECLARATION OF FRANK SUNDSTEDT

I, FRANK SUNDSTEDT, declare as follows:

1. I am a defendant in the above-captioned action which arises from alleged events which occurred when I was the Head Deputy District Attorney of the Pomona Branch Office. The matters stated herein are within my personal knowledge and, if duly sworn, I could and would competently testify thereto.

2. As Head Deputy District Attorney of the Pomona Branch Office, I determined, based on the number of felonies that were regularly filed in the El Monte (otherwise known as Rio Hondo) area office, that it be staffed with two full-time filing deputies, as was the case with each other area office of the Pomona Branch. Accordingly, in 1998, when Mike Davis, the only filing deputy at the time was transferred to a Los Angeles office, I assigned Leonard Torrealba and Ed Miller to serve as full-time filing deputies at the El Monte area office. Both Mr. Torrealba and Mr. Miller were Grade III deputies at the time that these assignments took effect. Thereafter, Mr. Torrealba was replaced by Jaime Hernandez, another Grade III deputy. When Mr. Miller requested to obtain more trial experience, as he had been a filing deputy for two years, his position was replaced by part-time deputy Deborah Scott, another Grade III deputy.

3. It was always my intent to have two full-time filing deputies in the El Monte area office just like each other area office of the Pomona Branch. The number of filings generated in each of these offices was about the same and each provided significant felony filings to the Pomona office for processing. Moreover, at no time did the Deputy in Charge of the El Monte area office ever advise me that a full-time deputy was not actually necessary. My experience with previous Deputies in Charge of the El Monte area office was that, due to the fact that the office had only one full-time filing deputy, they often had to file cases themselves which took valuable time away from their ability to mentor and supervise the new deputies in their offices.

4. Plaintiff Richard Ceballos was not the only Grade III deputy to ever have had a murder case taken away for

re-assignment. At least on one other occasion, a murder case assigned to a Grade III deputy, Connie Bugh was ultimately given to a Grade II deputy, Nancy Dukellis, to be tried. In other words, the *Perrin* case was not the only occasion where a murder case originally assigned to a higher grade deputy was ultimately given to a lower grade deputy for trial.

5. Mr. Ceballos' contention that he was the only calendar deputy from the Pomona Branch who was assigned to a filing deputy position in another district office is false, as evidenced by the assignment history of John Urgo, a senior Grade IV deputy. In approximately 1998, Mr. Urgo, who at that time was assigned as a calendar deputy at the Pomona Branch, was transferred to one of the courts at the Los Angeles Criminal Courts Building to work as a calendar deputy. However, sometime in 1999, Mr. Urgo was re-assigned to a full-time filing deputy position at the West Covina area office. My decision to assign Mr. Urgo to a filing deputy position, as opposed to a calendar deputy position, was dictated by the staffing needs of the Pomona Branch Office at that time. Subsequently, Mr. Urgo was re-assigned to the Pomona Branch to assume the responsibilities of a calendar deputy.

6. Moreover, Mr. Ceballos was initially given the option by Carol Najera to remain in Pomona and fill the full-time misdemeanor filing position or transfer to El Monte to fill the full-time felony filing position. Because Mr. Ceballos refused to choose, he was transferred to El Monte. If Mr. Ceballos had chosen to remain in Pomona to be a filing deputy, he certainly would not have been the only calendar deputy who was subsequently re-assigned to a filing deputy position. In fact, Amy Kuhnert (now Amy Glaudini), a Grade III deputy, was re-assigned as a filing

deputy after being a calendar deputy for approximately six months at the Pomona Branch.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 21st day of January, 2002, at Pasadena, California.

/s/ Frank E. Sundstedt
Frank Sundstedt

DECLARATION OF DON CLEM

I, DON CLEM, declare as follows:

1. I am a Deputy District Attorney for the Los Angeles District Attorney's Office, Grade Level IV, and have been so since August 2000. The matters stated herein are within my personal knowledge and, if duly sworn, I could and would competently testify thereto.

2. In March 1999, when I was a Grade Level III deputy, I was one of four calendar deputies in the Pomona Branch Office. Richard Ceballos was the other Grade Level III deputy who was a calendar deputy and the other two calendar deputies were Debra Passow and Michael Grossbard, both Grade Level IV deputies. When the Pomona courts consolidated in April 2000, Richard Ceballos became a co-calendar deputy with Michael Grossbard and I became a co-calendar deputy with Debra Passow.

3. Several months prior to the April 2002 consolidation of the courts, I was present when Frank Sundstedt advised both myself and Richard Ceballos that we were

the next Grade III deputies up to fill a filing position. I was transferred to the Auto Insurance Fraud Division in downtown Los Angeles in May 2000. At the time I was transferred to downtown, Richard Ceballos was still a co-calendar deputy with Michael Grossbard.

4. Felony and/or misdemeanor filings would not be outside the realm of a Grade Level III's workload. In fact, it was my understanding that the Head Deputy of Pomona staffed all filing positions in Pomona, El Monte and the Citrus courts.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 18th day of January, 2002, at Whittier, California.

/s/ Donald J. Clem
Don Clem

DECLARATION OF NANCY DUKELLIS

I, Nancy Dukellis, declare as follows:

1. I am a Deputy District Attorney for the Los Angeles District Attorney's Office, Grade Level III, and have been so since December 31, 1998. The matters stated herein are within my personal knowledge and, if duly sworn, I could and would competently testify thereto.

2. On August 4, 1997, I was assigned to the Pomona Branch Office. In May 2000, I had complications with my pregnancy which required me to be bedridden for two weeks. Due to my medical condition, I requested that I be

assigned to a filing position, which was granted by Frank Sundstedt. I remained a filing deputy in the Pomona Branch Office until November 2000.

3. Felony and/or misdemeanor filings would not be outside the realm of a Grade Level III's workload. In fact, it was common in the Pomona, El Monte and the Citrus Courts to rotate Grade III deputies to fill filing positions and Grade IIIs were routinely transferred based on the needs of the office.

4. It was and is not uncommon in the District Attorney's Office that felony cases would be taken away from a higher grade deputy and re-assigned to a lower grade deputy for a variety of reasons including case overload or to allow the lower grade deputies to obtain experience.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 22 day of January, 2002, at Pomona, California.

/s/ Nancy Dukellis
Nancy Dukellis

DECLARATION OF AMY (KUHNERT) GLAUDINI

I, AMY (KUHNERT) GLAUDINI, declare as follows:

1. I am a Deputy District Attorney for the Los Angeles District Attorney's Office, Grade Level III and have been so since January 1, 1999. The matters stated herein are within my personal knowledge and, if duly sworn, I could and would competently testify thereto.

2. In 1998, I was a trial deputy in the Pomona Branch Office where I was assigned to prosecute sexual assault cases. In March 1999, I was assigned to handle general felony trials in courtroom F. In approximately May 2000, I became a co-calendar deputy with Grade Level IV Deputy Deborah Passow and was assigned to courtroom F where I replaced Don Clem who was transferred to the Auto Insurance Fraud Division in downtown Los Angeles.

3. In November 2000, I became a filing deputy in the Pomona Branch Office.

4. Felony and/or misdemeanor filings would not be outside the realm of a Grade Level III's workload. In fact, it was common in the Pomona, El Monte and the Citrus Courts to rotate Grade III deputies to fill filing positions and Grade IIIs were routinely transferred based on the needs of the office.

5. It was and is not uncommon in the District Attorney's Office that murder cases would be taken away from one deputy and re-assigned to another deputy for a variety of reasons including case overload or to allow a particular deputy to obtain experience.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 18th day of January, 2002, at Pomona, California.

/s/ Amy Glaudini
Amy (Kuhnert) Glaudini

[Proof Of Service Omitted In Printing]

(6)

No. 04-473

Supreme Court, U.S.
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MAY 27 2005
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In The
Supreme Court of the United States

GIL GARCETTI, FRANK SUNDSTEDT, CAROL NAJERA and COUNTY OF LOS ANGELES,

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

CINDY S. LEE
Counsel of Record
JIN S. CHOI
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Telephone (818) 545-1925
Facsimile (818) 545-1937

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should a public employee's purely job-related speech, expressed strictly pursuant to the duties of employment, be blanketed with First Amendment protection simply because it touches on a matter of public concern, or should First Amendment protection also require the speech to be engaged in "as a citizen", in accordance with this Court's holdings in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983)?

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OPINION

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 361 F.3d 1168 (9th Cir. 2004) and is annexed in the printed appendix to the Petition for Writ of Certiorari as Appendix A.

JURISDICTION

The opinion of the Court of Appeals was filed on March 22, 2004. (Appendix to Petition ["P.A."] 1.) A timely petition for rehearing en banc was denied by order filed July 6, 2004. The underlying action arose under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and the district court's jurisdiction was based on 28 U.S.C. § 1331. (Joint Appendix ["J.A."] 137.) The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari was filed in the Supreme Court on October 1, 2004 (Supreme Court Case No. 04-473). This Court's order granting certiorari was issued on February 28, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The statutory and constitutional provisions involved in this case are as follows:

1. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,

any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . .

2. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . ; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Plaintiff's First Amendment Claim Was Based On Speech Expressed Pursuant To His Prosecutorial Duties And Responsibilities.

Since 1989, Richard Ceballos ("Ceballos") has been employed with the Los Angeles County District Attorney's Office as a deputy district attorney. (J.A. 7-8.) In this First Amendment-based retaliation action, brought pursuant to

42 U.S.C. § 1983, among other things,[1] Ceballos alleged that he was subjected to various adverse employment actions in retaliation for expressing speech strictly *within the scope of his employment duties* and in accordance with his prosecutorial responsibilities. (J.A. 141, 387-388, 390, 435; P.A. 42, 64.) These alleged retaliatory acts were purportedly committed by two supervisors, Frank Sundstedt ("Sundstedt") and Carol Najera ("Najera"), and former District Attorney for the County of Los Angeles Gil Garcetti (whose involvement was limited to the decision to not promote Ceballos from a grade III to a grade IV deputy district attorney level). (J.A. 138, 460.)

The circumstances surrounding the nature of the subject speech are largely undisputed. In February 2000, a criminal defense attorney approached Ceballos and discussed with him his concerns regarding the accuracy of a search warrant affidavit in a pending criminal case involving three defendants charged with several narcotics and weapon violations. (J.A. 434, 495.) The criminal case had been filed by the Los Angeles County District Attorney's Office after incriminating evidence was discovered upon execution of the search warrant. (J.A. 28, 434.) One of the defendants had already pled guilty and was currently serving a one year jail sentence while the other two had filed a motion to quash, sever and traverse ("motion to traverse") the search warrant. (J.A. 202, 496.)

At that time, Ceballos was a calendar deputy whose duties and responsibilities included handling all phases of

[1] Ceballos also alleged state law claims. The district court, however, declined to exercise supplemental jurisdiction over them after it dismissed the federal claims. (P.A. 5, 53.)

the criminal cases assigned to a particular court, including evaluating the progress of cases, negotiating dispositions and preparing disposition reports or memorandums like the one at issue in this case. (J.A. 9, 24-25, 30, 40-41.) Moreover, it was not uncommon for a calendar deputy to re-evaluate, when appropriate, the potential weaknesses of a pending criminal case. (J.A. 28-29.)

In accordance with these duties and obligations, Ceballos reviewed the search warrant affidavit, personally inspected the subject property, and concluded that the affidavit contained factual inaccuracies. (J.A. 435.) Therefore, Ceballos believed that the criminal case should be dismissed. (J.A. 48, 436.)

Because Ceballos was not authorized to dismiss the case without supervisor approval, he discussed his concerns regarding the search warrant affidavit with Sundstedt – one of his supervisors. (J.A. 436.) Subsequently, on March 2, 2000, Ceballos prepared a disposition memorandum/report – a routinely prepared intra-office document setting forth the reasons for dismissing pending criminal charges – which was reviewed by Sundstedt. (J.A. 40-41, 436, 495-502.) As a result of the disposition memorandum, Sundstedt held a meeting with the sheriff's deputy who prepared the search warrant affidavit and his lieutenant and captain to discuss potential problems with the criminal case. (J.A. 27, 437-438.) Also present at this meeting, which was conducted on March 9, 2000, were Najera and Ceballos. (J.A. 27, 438.)

Based on the discussions held at this meeting, Sundstedt concluded that the criminal charges should not be dismissed at that juncture but that the District Attorney's Office should proceed with the motion to traverse that had already been filed. (J.A. 47-48, 50-51, 116-117,

202.) Sundstedt believed that proceeding in this fashion would have allowed an independent judicial officer to assess the pertinent evidence surrounding the affidavit and to rule on its propriety. (J.A. 117-118.)

On March 20, 2000, the hearing on the motion to traverse was conducted, and Ceballos was one of four witnesses who testified. (J.A. 198-199, 202.) After considering the testimony presented, the criminal court denied the motion, finding that based on the deputies' observations of possible criminal activity at the crime scene, the only reasonable conclusion the magistrate judge could have reached was that there was probable cause for the issuance of the search warrant. (J.A. 348-352.) Accordingly, the criminal court denied the motion to traverse. (J.A. 352.) One of the three criminal defendants was convicted at trial, and the other remaining defendant entered a guilty plea. (J.A. 440.)

Ceballos's First Amendment claim was based on the theory that he was subjected to several adverse employment actions within six months after these March 2000 events, including: 1) his reassignment from a calendar deputy to a trial deputy position; 2) the reassignment of his one murder case to a lower level deputy district attorney; 3) his transfer to another courthouse; and 4) the denial of promotion from grade III to grade IV. (J.A. 9, 12, 22, 66-67, 142-143, 443.)

Importantly, Ceballos alleged that these employment actions were in retaliation for speech he engaged in pursuant to his *prosecutorial duties*. (P.A. 42, 64.) This undisputed fact played a critical role in the district court's determination that Ceballos's First Amendment claim was based on constitutionally *unprotected speech*.

B. The District Court Correctly Found That The Disposition Memorandum Did Not Warrant First Amendment Protection Because It Was Prepared "As Part Of His Job".

In its summary judgment order, the district court explained that "Plaintiff alleges the defendants subjected him to several acts of retaliation *on account of his March 2, 2000 memorandum*." (P.A. 55, emphasis added; *see* J.A. 140.) In determining whether Ceballos's First Amendment claim was based on constitutionally protected speech, the district court initially noted that "there are no significant factual disputes regarding the communication at issue – Plaintiff's March 2, 2000 memorandum". (P.A. 61.) While recognizing that the memorandum related to a matter of public concern, the district court relied on controlling case law and discussed "several cases in which federal courts have held that speech engaged in not merely as a concerned citizen but within the scope of the plaintiff's employment does not address a matter of public concern . . . . " (P.A. 62-63.) In applying this body of law to the facts of this case, the district court explained that Ceballos had acknowledged that the subject memorandum was commonly prepared and that it was prepared pursuant to his prosecutorial duties. (P.A. 64.) Thus, because "the memorandum was prepared as part of his job", the district court correctly found that the speech upon which Ceballos's First Amendment claim was based, was constitutionally unprotected. (P.A. 64-65.)

The district court also ruled that Garcetti, Sundstedt and Najera were entitled to qualified immunity because "a reasonable official may have believed – even if incorrectly – that the speech was not protected by the First Amendment." (P.A. 66.) Accordingly, the district court did not address the

remaining arguments, including the argument there were non-retaliatory reasons for the employment actions (J.A. 159-162, 170-174) and entered judgment against Ceballos. (P.A. 67.)

C. In Reversing The Entry Of Summary Judgment, The Ninth Circuit Held That The First Amendment Protects *All* Public Employee Speech Regarding A Matter Of Public Concern.

In writing for the majority opinion, Judge Reinhardt, relying almost exclusively on a prior Ninth Circuit decision (*Roth v. Veteran's Administration of the United States*, 856 F.2d 1401 (1988)), made clear that even if the disposition memorandum was an example of routine prosecutorial work product, it was constitutionally protected since it touched on a matter of public concern: "[i]t is only 'when it is clear that . . . the information would be of *no* relevance to the public's evaluation of the performance of governmental agencies' that speech of government employees receives no protection under the First Amendment." (P.A. 10, internal citations omitted; emphasis in original.)

Judge O'Scannlain, however, in his special concurrence, identified fundamental flaws in the *Roth* decision:

> . . . *Roth* minimized – indeed, it entirely ignored – the significance of *Connick*'s distinction between citizen speech offered by a public employee acting *as an employee* in carrying out his or her ordinary employment duties and speech spoken by an employee acting *as a citizen* expressing his or her personal views on a matter of public import.

(P.A. 36, emphasis in original.)

Moreover, in advocating an approach that is more consistent with this Court's precedents and the attendant emphasis on citizen speech, Judge O'Scannlain made astute observations regarding the basic nature of public employee speech that supported his criticism of *Roth*:

> The problem is that when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right. Instead, their speech is, in actuality, the State's.

(P.A. 41, emphasis in original.)

Judge O'Scannlain expounded on this important point further by persuasively arguing that job-required speech like Ceballos's should be subject to governmental regulation, as is the case with government-subsidized speech. (P.A. 45-46.) Judge O'Scannlain's summarizing remarks are especially instructive:

> There simply is no plausible basis for *Roth*'s holding that the government may not exercise control over its employees' routine job-related speech, when it assuredly may exercise precisely such control over the speech it subsidizes through its funding decisions.

(P.A. 46.)

Thus, Judge O'Scannlain has presented a compelling basis for this Court to reaffirm the boundaries of First Amendment protection in the public employment setting and reject Judge Reinhardt's oversweeping approach mandating all public employee speech relating to a matter of public concern be constitutionally protected, even if the

speech is expressed strictly pursuant to the duties of public employment.

SUMMARY OF ARGUMENT

The fundamental purpose of the free speech clause of the First Amendment is to establish an unbridled free speech marketplace where citizens are empowered to vigorously debate and openly exchange ideas and opinions. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

By protecting against undue governmental encroachment on this most basic of freedoms, the First Amendment has ably served its noble purpose. Since its ratification, the First Amendment has shouldered the burden in paving numerous inroads into the constitutional backwoods, broadening all citizens' rights to participate in public debates and contribute their personal opinions, ideas and philosophies (mainstream or not). Indeed, from establishing the power and freedom of the press[2] to safeguarding the internet from content-based regulations, the First Amendment's impact can neither be quantified nor undervalued.

Until the latter half of the twentieth century, however, public employees enjoyed little or no First Amendment protection for traditional free speech activities. Simply

[2] *Mills v. State of Ala.*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs.") (citation omitted).

put, public employees had been forced to leave their First Amendment rights at their employer's door. This constitutional vacuum resulted in the termination of public employees for their past exercises of their First Amendment rights and the abdication of these fundamental rights by virtue of their public employment status.

It was not until this Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968) that public employees were empowered to "comment[] upon matters of public concern" through speech engaged in "as the member of the general public". *Id.* at 569, 574. In holding that the First Amendment protects a public school teacher's right to participate in a public debate regarding school funding, this Court emphasized that the subject speech related to a question on which "*free and open debate* is vital to informed decision-making by the electorate." *Id.* at 571-72 (emphasis added). Furthermore, this Court also noted that the school teacher's employment was "only tangentially and insubstantially involved in the subject matter of the public communication." *Id.* at 574. Therefore, that the subject speech was *not job-required* was a significant factor that weighed *in favor* of constitutional protection.

In the next seminal case, this Court further emphasized the inexorable link between citizen speech and First Amendment protection in the public employment setting by stating that the "repeated emphasis in *Pickering* on the right of a public employee '*as a citizen*, in commenting upon matters of public concern,' was not accidental." *Connick v. Myers*, 461 U.S. 138, 143 (1983) (emphasis added). This Court also highlighted the nexus between the protection afforded in *Pickering* and the fundamental purpose of the First Amendment: "The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes

desired by the people. . . . *Pickering* . . . followed from this understanding of the First Amendment." *Id.* at 145 (internal quotations and citations omitted).

The Ninth Circuit's approach, as articulated in Judge Reinhardt's majority opinion below, represents an irreconcilable breach with these historical and legal backdrops. By declaring all public employment speech to be protected by the First Amendment with the only caveat being that the speech be of "relevance to the public's evaluation of the performance of government agencies", the Ninth Circuit has ignored the rationale of this Court's precedents and left in its wake public employers who must now assume that virtually all job-required speech is constitutionally protected. This is because on some level, all work of public employees provides a basis for the public's evaluation of the performance of government agencies.

The adoption of this extremely low threshold for constitutional protection will not only increase the flow of First Amendment litigation and severely hinder the ability of public agencies to efficiently execute their public services, but it will also signal a complete break from the significant concerns identified in this Court's seminal opinions regarding the limits of First Amendment protection in the public employment setting. As Judge O'Scannlain urged below, "the time has come for us to reappraise our jurisprudence concerning the free speech rights of the publicly-employed and the scope of legitimate governmental regulation in its capacity as employer." (P.A. 51.)

Thus, preventing the revamped approach espoused by the Ninth Circuit from irrevocably altering the landscape of First Amendment jurisprudence requires a firm pronouncement that the holdings in *Pickering* and *Connick*

were not for naught. The moment is ripe for this Court "to steer [the] drifting First Amendment jurisprudence back to its proper moorings." (P.A. 51.) As before, this Court should tread with care to ensure that the First Amendment protects speech engaged in "as citizens", not any and all speech that happens to relate in one way or another to a matter of public concern.

ARGUMENT

I. BLANKETING SPEECH EXPRESSED STRICTLY PURSUANT TO THE DUTIES OF PUBLIC EMPLOYMENT WITH CONSTITUTIONAL PROTECTION DOES NOT ADVANCE THE FUNDAMENTAL PURPOSES OF THE FIRST AMENDMENT.

A. Since Its Adoption, The Free Speech Clause Of The First Amendment Has Guaranteed *Citizens* Access To An Open Forum For Public Debate.

This Court has, on numerous occasions, commented on the fundamental purposes of the First Amendment. *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and ever outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'") (quoting from *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)); *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California*, 475 U.S. 1, 8 (1986) ("By protecting those *who wish to enter the marketplace of ideas* from government attack, the First Amendment protects the public's interest in receiving information.") (emphasis added); *Mills v. State of Ala.*, 384 U.S. 214, 218 (1966) ("Whatever

differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("*It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas* in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.") (emphasis added).

This perception of the underlying purpose of the First Amendment certainly is not a recent development:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty *to discuss publicly and truthfully all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply *the public need for information and education with respect to the significant issues of the times*. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Thornhill v. State of Alabama, 310 U.S. 88, 101-02 (1940) (footnotes omitted; emphasis added).[3]

[3] In his discussion of the Founding Fathers' motivations underlying the First Amendment, Justice Brandeis wrote:

(Continued on following page)

The fundamental intent of the First Amendment should be given due consideration in establishing the boundaries of its protection, and in particular, the determination of whether these boundaries should encompass speech expressed pursuant to ordinary job duties. Indeed, such speech neither represents nor advances the unquestioned goals of the First Amendment, and blanketing such speech with constitutional protection was hardly the driving concern in the removal of the barriers depriving public employees of the most basic First Amendment protection.

B. The Analyses In *Pickering* And *Connick* Are Inextricably Intertwined With The Fundamental Purposes Of The Free Speech Clause.

Throughout much of our history, public employees, by virtue of their public employment, had very little First Amendment protection.

> For most of this century, the unchallenged dogma was that a public employee had no right to object

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> Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney v. California, 274 U.S. 357, 375-76 (1927) (J. Brandeis, conc.).

> to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights. . . . The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950s and early 1960s to require public employees, particularly teachers, to swear oaths of loyalty to the state and reveal the groups with which they associated.

Connick, 461 U.S. at 143-44.

Through these earlier cases, this Court expanded constitutional protection to public employees by invalidating statutes that compelled the relinquishment of First Amendment rights – statutes that "sought to suppress the rights of public employees to participate in public affairs." *Id.* at 144-45. The strong stance developed against such statutory infringements was wholly consistent with the main purpose of the First Amendment – "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

The claims in these earlier cases, however, did not directly implicate the free speech clause of the First Amendment. Instead, the plaintiffs, who had been denied public employment pursuant to state statutes requiring loyalty oaths, absence of ties with certain associations, and the like, based their claims on the due process clause of the Fourteenth Amendment or on challenges to the facial validity of the subject statutes as being impermissibly vague, ambiguous or overbroad. *See, e.g., Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961) (holding that a state statute requiring state employees to pledge an oath swearing a lack of association with the Communist party

was unconstitutionally vague and constituted a denial of due process of law); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (holding that a state statute requiring state employees to execute a loyalty oath was unconstitutionally vague).

The trend toward recognizing and defining the extent of First Amendment protection for public employees was continued in *Pickering*. Faced with the claim by a public school teacher that he had been discharged based solely on his public criticisms of the school board in violation of the *free speech clause* of the First Amendment, this Court held that such speech by public employees is constitutionally protected. At the same time, the door to First Amendment protection was not swung wide open in that the protection was carefully limited and in great part wedded to the underlying purposes of the First Amendment. Because the analysis in almost every case involving a public employee's First Amendment claim has begun (and oftentimes ended) with a discussion of *Pickering*, the facts and relevant legal analysis from this landmark case are worth revisiting.

1. The Holding In *Pickering* Was Carefully Limited And Did Not Espouse First Amendment Protection For Purely Job-Required Speech.

Marvin Pickering was a public high school teacher in the Township High School District 205 in Will County, Illinois. From 1961 to 1964, the Board of Education sought approval of two bond proposals and two tax rate increases, three of which were defeated. In the days prior to the defeat of the second tax rate measure, several articles and a letter from the superintendent were published in the local newspaper. After the tax rate measure was defeated, Pickering submitted a letter to the newspaper's editor,

"attack[ing] . . . the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources." *Pickering*, *supra*, 391 U.S. at 566. Pickering also alleged that the superintendent had sought to prevent teachers from "opposing or criticizing the proposed bond issue." *Ibid.*

Pickering was then "dismissed for writing and publishing the letter." *Ibid.* A hearing was then held before the Board, at which time the Board contended that the letter contained false and defamatory statements, "would be disruptive of faculty discipline" and cause widespread dissension. *Id.* at 567. Without reaching any findings on the effects of the letter on the community, the Board "found the statements to be false as charged." *Ibid.* The Illinois state courts upheld the dismissal, rejecting Pickering's claim that "he could not be constitutionally dismissed from his teaching position." *Id.* at 568.

As an initial matter, this Court made clear a public employee could not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public concern", and that this principle had been established in cases dating back to 1952. *Ibid.* Pickering's First Amendment claim, however, could not be resolved on the basis of this principle alone due to the significant interests that affect the government's role as employer:

> [I]t cannot be gainsaid that the State has interests as an employer in regulating *the speech of its employees* that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a *balance between the interests of the teacher, as a citizen, in commenting*

> *upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.*

Ibid. (emphasis added).[4]

Just from these comments, it is readily apparent that the contemplated balancing of interests comes into play where the employee engages in citizen speech on a matter of public concern, thereby requiring the weighing of those interests against the employer's interests in workplace efficiency and harmony. Conversely, these very instructive statements do not suggest that First Amendment protection should be triggered *whenever* the subject matter of job-required speech touches on a matter of public concern.

This link between citizen speech and First Amendment protection was also integrated into the ensuing analysis of Pickering's speech. While declining to articulate a single test by which to evaluate public employees' criticisms of their employers, this Court articulated "some of the general lines along which an analysis of the controlling interests should run." *Id.* at 569. In doing so, implicitly and explicitly, this Court repeatedly emphasized the relationship between First Amendment protection for public employees and the extent to which the subject speech contributed to the *public debate*:

- "More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern. . . . On such a question,

[4] *See Connick, supra*, 461 U.S. at 151 ("The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public.").

> *free and open debate is vital to informed decision-making by the electorate." Id.* at 571-72.

- [Where a public school teacher's erroneous and critical statements about a matter of public concern have not been shown to have had a disruptive effect in the workplace], "we conclude that the interest of the school administration in limiting teachers' opportunities *to contribute to the public debate* is not significantly greater than its interest in limiting a similar contribution to any member of the general public." *Id.* at 573.

- "The public interest in having *free and unhindered debate on matters of public importance* – the *core value of the Free Speech Clause of the First Amendment* – is so great" that a public official may recover damages for defamatory statements only if they are made with knowledge of their falsity or reckless disregard for their truth or falsity. *Ibid.* (emphasis added).

- "[I]n a case as such as the present one, in which *the fact of employment is only tangentially and insubstantially involved* in the subject matter of the public communication made by a teacher, we conclude that *it is necessary to regard the teacher as the member of the general public he seeks to be." Id.* at 574 (emphasis added).

- "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's *exercise of his right to speak on issues of public importance* may not furnish the basis for his dismissal from public employment." *Ibid.* (emphasis added).

Thus, this Court did not find Pickering's speech to be constitutionally protected simply because the speech

pertained to a matter of public concern but identified as significant factors 1) the relationship between the speech and the speaker's employment and 2) the speaker's intent to be treated as a citizen – and not as an employee.

Not only can *Pickering* rightly be considered to be the first case where this Court addressed issues directly pertinent to the instant case, it can also be considered the most pivotal because its focus on Pickering's motivation to participate in the public debate "as a citizen" echoes just as loudly over 35 years later. At this juncture in the development of First Amendment jurisprudence, what needs to be answered is whether the emphasis on citizen speech in *Pickering* should be maintained (and thereby preserving the nexus between First Amendment protection and its fundamental purpose) or abandoned and left by the wayside, as the Ninth Circuit has chosen to do. In addressing this critical question, the continued emphasis of these First Amendment themes in this Court's next benchmark case should not be ignored.

2. Under *Connick*, First Amendment Protection Requires Speech To Be Expressed "As A Citizen."

Although this Court has had the opportunity on a number of occasions since *Pickering* to address the protected or unprotected nature of various types of public employee speech, the one case that has come to be considered as the "bookend" to *Pickering* is *Connick v. Myers*. It is therefore not surprising that the term *"Pickering-Connick* balancing test" has also become engrained in the legal vernacular of First Amendment jurisprudence in the

public employment context. Thus, the facts and analysis in *Connick* also merit special attention here.[5]

In light of the relationship that has been formed between these two cases, it is fitting that Justice White began the majority opinion with a concise description of the essence of *Pickering*: "In *Pickering* . . . , we stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick*, *supra*, 461 U.S. at 140.

Justice White also explained in his introduction that *Pickering* had identified the competing interests at stake: on one side, the interests of the government to promote the efficiency of the public services performed through its employees, and on the other side, the interests of the employee, "'*as a citizen*, in commenting upon matters of public concern[.]'" *Ibid.* (quoting from *Pickering*, *supra*, 391 U.S. at 568; emphasis added). Against this backdrop of competing interests, Justice White explained further that the Court was "return[ing] to this problem . . . [to] consider whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs." *Ibid.*

The plaintiff in *Connick*, Sheila Myers, was a prosecutor employed by the New Orleans District Attorney's Office. After learning that she was to be transferred to a different department, Myers expressed her opposition to

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[5] In *Waters v. Churchill*, 511 U.S. 661 (1994), this Court stated that *Connick* "set forth a test for determining whether speech by a government employee may, consistently with the First Amendment, serve as a basis for disciplining or discharging that employee." *Id.* at 664.

several supervisors, including the district attorney, Harry Connick. Myers subsequently prepared a questionnaire designed to obtain the views of her fellow prosecutors on a number of topics, including the transfer policy, office morale, level of confidence in the supervisors and whether anyone had felt pressured to work in political campaigns. *Id.* at 141. Myers circulated the questionnaire to 15 of her coworkers. *Ibid.* Immediately after learning about the questionnaire and being told that it had created a "mini-insurrection", Connick informed Myers that she was being terminated because she had refused to accept the transfer and that the questionnaire was considered an act of insubordination. *Ibid.*

In her section 1983 action, Myers alleged that the termination was unlawful because "she had exercised her constitutionally-protected right of free speech." *Ibid.* The district court and the Fifth Circuit Court of Appeals agreed, finding that the questionnaire involved matters of public concern and the state had not clearly demonstrated that the questionnaire had substantially interfered with the operation of the district attorney's office. *Id.* at 142. In reviewing the lower courts' findings, this Court reiterated the pertinent "task" at hand: "to seek 'a balance between the interests of the [employee], *as a citizen*, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Ibid.* (quoting from *Pickering*, *supra*, 391 U.S. at 568).

Prior to determining whether any part of Myers's questionnaire involved constitutionally protected speech, this Court discussed the analysis in *Pickering* at length, noting at the outset that the repeated emphasis in *Pickering* that a public employee has a right, "as a citizen"

to comment upon matters of public concern, "was not accidental." *Id.* at 143. This Court also explained that this critical language "reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices *could not function if every employment decision became a constitutional matter*." *Ibid.* (emphasis added).

These remarks regarding the historical backdrop to the holding in *Pickering* were not merely made in passing. Rather, this Court explained further that the cases upon which *Pickering* had been "rooted" – cases that chipped away at the constitutional restrictions imposed on public employees – involved "statutes and actions sought to suppress the rights of public employees to participate in *public affairs*." *Id.* at 144-45 (emphasis added). Moreover, "[t]he explanation for the Constitution's special concern with threats to *the right of citizens to participate in political affairs* is no mystery. The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . *Pickering . . . followed this understanding of the First Amendment.*" *Id.* at 145 (emphasis added).

In direct conjunction with this discussion of the historically driven rationale of *Pickering*, this Court articulated the standard for determining constitutional protection for public employee speech:

> [W]hen a public employee *speaks not as a citizen upon matters of public concern*, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken

> by a public agency allegedly in reaction to the employee's behavior.

Id. at 147 (emphasis added). This Court, therefore, specifically identified citizen speech as a key variable in this constitutional equation, and underscored this point further with the very next statement: "Our responsibility is to ensure that *citizens* are not deprived of fundamental rights by virtue of working for the government. . . . " *Ibid.* (emphasis added).

Although this Court did not explicitly find that Myers's questionnaire involved citizen speech, there can be no dispute that the questionnaire was *not* prepared pursuant to her prosecutorial duties.[6] This Court, however, did closely review the questionnaire to determine whether any part of it involved a matter of public concern and found that the portion regarding the pressure to participate in political campaigns was the only part of the questionnaire that was constitutionally protected. *Id.* at 149. Thus, the essence of this finding was that with respect to this part of the questionnaire, Myers had spoken *as a citizen upon a matter of public concern*.[7]

The fundamental relationship between the underlying purposes of the First Amendment and incorporating a

[6] In direct contrast, Ceballos's disposition memorandum was indisputably prepared in accordance with his normal prosecutorial duties and therefore devoid of any citizen speech.

[7] This Court then balanced the competing interests and held that "[t]he limited First Amendment interest involved here does not require that Connick tolerate action he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154.

citizen speech element in the test for constitutional protection was further addressed in this Court's telling concluding remarks:

> Although today the balance is struck for the government, this is no defeat for the First Amendment. For it would be a Pyrrhic victory for *the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs* were confused with the attempt to constitutionalize the employee grievance that we see presented here.

Id. at 154 (emphasis added).

Despite this warning against the excessive expansion of the scope of First Amendment protection, the "Pyrrhic victory" discussed in *Connick* could be achieved if purely routine, job-required speech is deemed constitutionally protected. Such an ignominious "victory" can be prevented by maintaining boundaries for First Amendment protection that are consistent with its fundamental purposes, as opposed to virtually eradicating them by only requiring that the subject speech touch on a matter of public concern.

II. PUBLIC EMPLOYEE SPEECH EXPRESSED STRICTLY PURSUANT TO THE DUTIES OF EMPLOYMENT SHOULD NOT BE AFFORDED FIRST AMENDMENT PROTECTION.

A. This Court Has Never Held That Purely Job-Required Speech Is Constitutionally Protected.

Since 1968, this Court has addressed First Amendment claims arising from the public employment setting

on a number of occasions. While the Court's holdings and analyses in *Pickering* and *Connick* have been the most influential on the lower courts in addressing such claims, this Court's other opinions in this area further suggest that the Ninth Circuit's approach ventures far beyond the parameters established by this Court. Indeed, at no time since *Pickering* has this Court held that job-required speech should be afforded First Amendment protection.

Perry v. Sindermann, 408 U.S. 593 (1972) involved facts reminiscent of *Pickering* and the resulting holding was also similar. The plaintiff, Robert Sindermann, was a college professor employed by the state of Texas. While teaching at Odessa Junior College, he was elected president of the Texas Junior College Teachers Association. *Id.* at 594. While acting in this capacity (and not in his capacity as an employee), Sindermann "*left his teaching duties* on several occasions to testify before committees of the Texas Legislature" and "became involved in public disagreements with the policies of the college's Board of Regents." *Id.* at 594-95 (emphasis added). When Sindermann's employment contract was subsequently terminated, he filed a federal action alleging in part that his right to free speech had been violated because he had not been rehired due to "his public criticism of the policies of the college administration". *Id.* at 595. The district court granted the defendants' summary judgment motion on the ground Sindermann was not a tenured professor. *Id.* at 596.

This Court, however, found that the lack of tenure was "immaterial to his free speech claim." *Id.* at 598. More importantly, this Court held that Sindermann's allegation that "his nonretention was based on his testimony before legislative committees and his other public statements"

and that "this public criticism" was protected by the First Amendment presented "a bona fide constitutional claim." *Ibid.* This Court stated further:

> For this Court has held that a teacher's *public criticism* of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment.

Ibid. (emphasis added).

Thus, four years after *Pickering*, this Court did not suggest at all that a public employee was entitled to First Amendment protection for speech engaged in during the normal course and scope of employment, in accordance with the duties of employment. Moreover, no such suggestion has been made in the cases since *Perry*. *See*, *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 284 (1977) (reiterating *Pickering* test for determining whether "speech of a government employee is constitutionally protected" and finding protected a public school teacher's communication with a radio station regarding the school's dress code for teachers); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-17 (1979) (finding constitutionally protected a teacher's personal opinions regarding the school district's desegregation efforts, expressed to a supervisor); *United States v. National Treasury Employees Union*, 513 U.S. 454, 465 (1995) (in holding unconstitutional the prohibition of government employees from receiving honoraria, the plaintiffs were found to have sought "compensation for their expressive activities in their *capacity as citizens*" and the speeches were found to lack "relevance to their employment") (emphasis added).

In this Court's most recent opinion in this area, the linkage between citizen speech and First Amendment protection was reiterated. "Were [public employees] not able to speak on [matters of public concern], *the community would be deprived of informed opinions* on important public issues. [Citation.] The interest at stake is as much *the public's interest in receiving informed opinion* as it is the employee's own right to *disseminate it*." *City of San Diego v. Roe*, 125 S.Ct. 521, 525 (2004) (emphasis added).[8] Thus, neither these most recent remarks nor the analyses in this Court's earlier cases, suggest a viable connection between purely job-required speech and First Amendment protection.

B. Many Courts Have Readily Recognized The Nexus Between Citizen Speech And First Amendment Protection.

Notwithstanding the holdings and analyses in this Court's cases since *Pickering*, the Ninth Circuit and others have decided that a public employee's First Amendment claim should be contingent on only one factor – whether the subject speech touches on a matter of public concern. Contracting the constitutional analysis in this manner (and thereby compelling public employers to demonstrate either at summary judgment or at trial that the subject

[8] In *Roe*, the Ninth Circuit had held that a police officer who sold videotapes of himself engaging in sexually explicit acts, while dressed as a law enforcement officer, enjoyed protection under the First Amendment because his "speech" may have been of interest to a small segment of the general public. Without oral argument, this Court reversed, holding that the officer's sexually explicit acts did not implicate a matter of public concern that triggered the application of the balancing of factors under *Pickering* and *Connick*. *Id.* at 526.

speech was disruptive enough to justify the challenged employment action) renders moot the important consideration of whether the subject speech had been expressed "as a citizen". The undeniable result is something that this Court in *Connick* warned expressly against – that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick, supra*, 461 U.S. at 149.

Not all courts, however, have adopted the Ninth Circuit's approach, thereby maintaining the vitality of "citizen speech" in this constitutional equation. *See, Gonzalez v. City of Chicago*, 239 F.3d 939, 941-42 (7th Cir. 2001) (holding that a police officer's reports, prepared pursuant to his official duties, regarding police misconduct were not constitutionally protected); *Thompson v. Scheid*, 977 F.2d 1017, 1021 (6th Cir. 1992) (holding that a county fraud investigator's conversations with federal investigators regarding a pending confidential investigation were not constitutionally protected because they related to his "duties as an employee" and "cannot be considered speaking on matters of public concern").

The Fourth Circuit has also consistently found job-required speech to fall outside the scope of First Amendment protection. In *Urofsky v. Gilmore, III*, 216 F.3d 401 (4th Cir. 2000), the Fourth Circuit addressed at length the importance of *citizen speech* in this equation:

> The *threshold inquiry* thus is whether the Act regulates speech by state employees *in their capacity as citizens* upon matters of public concern. If a public employee's speech made in his capacity as a private citizen does not touch upon a matter of public concern, the state, as employer, may regulate it without infringing any First

Amendment protection. [Citations.] To determine whether speech involves a matter of public concern, we examine the content, context, and form of the speech at issue in light of the entire record. [Citation.] . . . Further, the place where the speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace. [Citations.] *The Supreme Court has made clear that the concern is to maintain for the government employee the same right enjoyed by his privately employed counterpart.* To this end, in its decisions determining speech to be entitled to First Amendment protection the Court has emphasized the *unrelatedness of the speech at issue to the speaker's employment duties.* [Citations.] Thus, critical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is "made primarily in the [employee's] role as citizen or primarily in his role as employee." [Citations.]

Id. at 406-07 (emphasis added) (quoting from *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 (5th Cir. 1986)).

The Fourth Circuit's unwavering focus on these important distinctions has also been mirrored in the Fifth and Eighth Circuits. *See*, *Kinsey v. Salado Independent School Dist.*, 950 F.2d 988, 994 (5th Cir. 1992) ("cases involving public employees who occupy policymaker or confidential positions fall much closer to the employer's end of the spectrum, *where the government's interests more easily outweigh the employee's (as a private citizen)*") (emphasis added); *Terrell*, 792 F.2d at 1362 ("Because almost anything that occurs within a public agency *could*

be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.") (emphasis in original); *Sparr v. Ward*, 306 F.3d 589, 594 (8th Cir. 2002) ("When a public employee's speech is purely job-related, her speech will not be deemed a matter of public concern."); *Roberts v. Van Buren Public Schools*, 773 F.2d 949, 955 (8th Cir. 1985) ("We need not proceed to the *Pickering* balance when the employee spoke not as a citizen but as an employee expressing a personal grievance as to internal office policy."); *see also* the cases cited in the Petition at 15-16 and Reply to Opposition at 3-7.

Thus, many courts have already recognized the pivotal nature of citizen speech and duly considered this Court's cautionary words against allowing public employees to craft actionable First Amendment claims based on speech involving a matter of public concern but expressed strictly pursuant to their job duties. This more balanced approach should be adopted in favor of the truncated approach endorsed below.

C. Routine, Job-Required Speech, Which By Definition Constitutes Government Speech, Should Not Give Rise To A First Amendment Claim.

As discussed above, there are ample grounds for reversing the judgment below and finding that the subject

speech was not constitutionally protected because Ceballos had not expressed himself as a citizen. As Judge O'Scannlain ably articulated, there is an additional layer in this analysis that has been largely overlooked – that First Amendment protection should be reserved for true citizen speech because public employees necessarily speak on behalf of the government when they engage in routine, job-required speech. Concomitantly, such speech (expressed *on behalf* of the government) should not give rise to actionable First Amendment claims *against* the government.

This Court has already addressed the incongruity of a similar scenario involving the regulation of speech by recipients of governmental funding. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the plaintiffs challenged on various grounds the facial validity of the regulations that govern funding under Title X, in particular the regulations that prohibited abortion counseling in federally funded family planning projects.[9] Plaintiffs' First Amendment argument was that the regulations "impermissibly discriminat[ed] based on viewpoint because they prohibit 'all discussion about abortion as a lawful option . . . while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.'" *Id.* at 192 (citation omitted). This Court's explanation as to why the regulations did not result in the unlawful abridgment of free speech has compelling value in the instant case:

> Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on

[9] The plaintiffs were "Title X grantees and doctors who supervise Title X funds". *Id.* at 181.

> abortion counseling and referral. *The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project.* The regulations, which govern solely the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals. The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.

Id. at 198-99 (emphasis added).

Moreover, since *Rust*, this Court has clarified that government-funded speech is equivalent to "governmental speech". *Legal Services Corp. v. Velasquez*, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, . . . [w]e have said that viewpoint-based funding decisions can be sustained in instances in which *the government is itself the speaker* . . . ") (emphasis added); *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000) ("funds raised by the government will be spent for speech and other expression to advocate and defend its own policies"); *see also, United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 211-12 (2003) (requiring public libraries that received federal funding to install internet filtering software to block obscene material did not violate the First Amendment).

While the majority opinion below refused to acknowledge the parallels between the speech engaged in by the

governmentally funded and the *governmentally employed* (despite Judge O'Scannlain's efforts to bring them to light), the Fourth Circuit has recognized that these two groups are very similarly situated vis-à-vis the First Amendment:

> [R]estrictions on speech by public employees in their capacity as employees are analogous to restrictions on government-funded speech. . . . In both situations – public employee speech and government-funded speech – the government is entitled to control the content of the speech because it has, in a meaningful sense, "purchased" the speech at issue through a grant of funding or payment of a salary. The limits of government control are similar in both types of cases, as well: *Just as the government as provider of funds cannot dictate the content of speech made outside the confines of the funded program [citation], the government as employer is restricted in its ability to regulate the speech of its employees when they speak not as public employees, but as private citizens on matters of public concern.*

Urofsky, supra, 216 F.3d at 408 n. 6 (emphasis added).

Thus, over the last 15 years, this Court has made clear that government-funded speech and First Amendment protection do not mix. This well-established principle and its underlying rationale provide valuable insight to the First Amendment issue raised in this case, i.e., whether the First Amendment protects job-required government employee speech. Indeed, it is difficult to distinguish between the speech engaged in by individuals whose services have been funded by the government from those individuals whose salaries have been paid by the government.

When measured against these compelling parallels, the deficiencies of the Ninth Circuit's approach (which renders irrelevant the fact that the subject speech was paid for by the County of Los Angeles and engaged in pursuant to Ceballos's job duties and responsibilities) become even more evident. Simply put, the Ninth Circuit's failure to recognize that the disposition memorandum – prepared by Ceballos pursuant to his prosecutorial duties and responsibilities – was in essence the work product of the district attorney's office, renders its holding inherently flawed.

III. THE NINTH CIRCUIT'S OVERLY SIMPLIFIED APPROACH WILL SEVERELY DISRUPT GOVERNMENTAL OPERATIONS BY CREATING UNDUE CONFUSION AND UNPREDICTABILITY, WHILE ALSO DRAMATICALLY INCREASING THE VOLUME OF FIRST AMENDMENT LITIGATION.

Ever since *Pickering*, public employee plaintiffs have been required to meet a basic pleading threshold – that their First Amendment claims were based on *constitutionally protected speech*. If they met this pleading burden, then their government employers' only method of prevailing in the action prior to trial has been to demonstrate with sufficient admissible evidence that the factors in the *Pickering-Connick* balancing test weighed in their favor, as a matter of law. Due to the prohibitive costs and fees incurred during the defense of federal employment actions, government employers have in the past incurred tremendous drains on their limited financial resources whenever employees satisfy their initial pleading burden. This litigational reality has undoubtedly acted as a significant

deterrent against the unlawful retaliation against public employees for their bona fide First Amendment activities.

This reality, however, will be transformed into an operational nightmare for all government employers if the Ninth Circuit's approach is adopted, thereby allowing any and all routine, job-required speech to act as the basis for an actionable First Amendment claim subject to dismissal at the summary judgment stage at the very earliest. The repercussions of this legal scenario will be especially debilitating on government offices where subjects related to matters of public concern are constantly discussed or where employees' primary job duties are to speak about such matters.

For example, under the Ninth Circuit's one-step analysis for determining First Amendment protection, virtually every statement made to the press corps by the White House press secretary would be draped with First Amendment protection since these statements undoubtedly will relate to a matter of public concern. Consequently, if the President or other supervisory official were to ever take an adverse employment action against the press secretary, he or she would state an actionable First Amendment retaliation claim by simply alleging that the employment action was in retribution against one of the countless prior statements issued to the press corps. Moreover, because such a claim would not be subject to dismissal at the pleading stage, the defendant in that action (possibly even the President) would have to wait until the summary judgment stage, at the very least, to obtain dismissal of the claim.

Another illustrative example is one that can be taken from today's headlines regarding the unending efforts of

this country's law enforcement and intelligence agencies to prepare against and to prevent another terrorist attack. Every communication (written or otherwise) regarding the effectiveness with which information is shared by this country's various intelligence agencies, between and amongst intelligence analysts employed by these agencies, would be given First Amendment protection. Although these job-required assessments, opinions and conclusions relate to a genuine matter of public concern, they should not be blanketed with constitutional protection because they lack the essence of citizen speech that lies at the heart of the free speech clause of the First Amendment.

Finally, the examination of the normal duties of federal, state and county prosecutors throughout the nation further demonstrates the impropriety of extending First Amendment protection to all public employee speech that relates to a matter of public concern. In addition to engaging in the type of speech at issue in the instant case – the preparation of memorandums containing prosecutorial assessments of evidence and witness credibility – prosecutors are trained and *required* to speak on behalf of the government (and "The People") whenever they argue a matter in court or conduct a criminal trial before a jury. Without question, under the Ninth Circuit's approach, virtually all such communications will be constitutionally protected, notwithstanding the absence of any hint of "citizen speech".

The unavoidable practical consequence will be that the prospect of future First Amendment claims based on past job-required communications will have to be factored into any necessary employment action which may be deemed to be adverse by the employee involved. If permitted to stand, the Ninth Circuit's decision will require

public entities to ascribe actual or potential constitutional significance to public employee expression made in the context of routine, job-required duties. This quagmire is not one that could have been anticipated when this Court ensured that public employees be afforded constitutional protection for traditional First Amendment activities, and it should not be permitted to continue.

Indeed, the manipulation of this Court's pronouncements to find purely job-required speech to be constitutionally protected will create a set of rules that bears no resemblance to those established in *Pickering*. Possibly even more importantly, these new rules will do nothing to promote the fundamental purposes of the First Amendment, as repeatedly and eloquently described by this Court. Unquestionably, the Ninth Circuit's approach of focusing exclusively on whether the subject speech touches on a matter of public concern will cause a descent down the slipperiest of slopes. By boiling the test for First Amendment protection down to this single element (an element that can be easily met for pleading purposes), the doors to every courtroom in this country will suddenly be swung wide open for an inevitable rise in First Amendment-based retaliation claims *where the plaintiffs never sought to be members of the general public* (as Marvin Pickering undoubtedly did).

The flip side of this litigational coin is that the ease with which a cognizable First Amendment claim could be alleged will undoubtedly cause a widespread chilling effect on necessary and appropriate employment actions, for fear that such actions could be linked (by allegation) to a prior instance of routine, job-required speech that happened to touch on a matter of public concern. Because government employers will be deterred in many instances from taking

appropriate employment actions in the first instance or will be tied up in litigation when they do, like in this case,[10] their ability to perform the public services expected of them will necessarily be undermined. The productivity and efficiency of government offices – the operations of which are funded by taxpayer dollars – will be placed in unnecessary jeopardy if government employers are forced to face the prospect of expensive and complicated First Amendment litigation whenever they contemplate taking what they believe to be legitimate employment actions against incompetent and unproductive employees.

Thus, allowing government employees to seek relief under the First Amendment for speech expressed strictly pursuant to their job duties would constitute an unjustified departure from the body of First Amendment jurisprudence that paved the way for public employees to have constitutional protection for speech or activities engaged in "as citizens", and not as government employees. Limiting First Amendment protection to true exercises of the free speech rights afforded to *all citizens* will restore this

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[10] Notwithstanding the non-retaliatory reasons demonstrated by petitioners which were not reasonably disputed by Ceballos through admissible evidence (J.A. 12-13, 62-66, 71-72, 103-109, 119-130, 133, 134-135, 364-366, 368-371, 374-379, 444-461, 531-536), the Ninth Circuit nevertheless reversed the district court's grant of summary judgment and remanded the case back to the lower court for a jury trial:

> It is possible that [petitioners] will be able to show at trial that the adverse acts Ceballos alleges were not taken in retaliation for his constitutionally protected speech. However, "[a]s with proof of motive in other contexts, this element of a First Amendment retaliation suit . . . involves questions of fact that normally should be left for trial."

(P.A. 25, citations omitted.)

constitutional continuity, while also enabling government offices to be efficiently operated and managed, and public services to be carried out without undue infringement. Accordingly, *any remaining ambiguities should be erased with a declaration that public employees enjoy the benefits of First Amendment protection when they, as citizens, speak about matters of public concern – not when they happen to address such matters while carrying out their ordinary job duties.*

CONCLUSION

For the reasons hereinabove stated, petitioners Gil Garcetti, Frank Sundstedt, Carol Najera and the County of Los Angeles request that this Court reverse the Ninth Circuit's opinion.

Dated: May 27, 2005.

Respectfully submitted,

CINDY S. LEE*
JIN S. CHOI
FRANSCELL STRICKLAND, ROBERTS & LAWRENCE
100 West Broadway, Suite 1200
Glendale, California 91210-1219
(818) 545-1925

Attorneys for Petitioners

*Counsel of Record**
Admitted to the Bar of the Supreme Court
on July 17, 1998

(5)

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IN THE

Supreme Court of the United States

GIL GARCETTI, ET AL.,

Petitioner,

v.

RICHARD CEBALLOS,

Respondent.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HENRY W. UNDERHILL, JR.
LANI L. WILLIAMS
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
1110 VERMONT AVENUE, N.W., SUITE 200
WASHINGTON, DC 20005
(202) 466-5424

GENE C. SCHAERR*
LINDA T. COBERLY
PETER KRYN DYKEMA
EDWIN H. CALDIE
WINSTON & STRAWN LLP
1700 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 282-5000

Counsel for Amicus Curiae

* Counsel of Record

May 27, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Should a public employee's purely job-related speech be cloaked with First Amendment protection simply because it touches on a matter of public concern?

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INTERESTS OF *AMICUS CURIAE*[1]

The Ninth Circuit below held that speech by governmental employees, even in the course of performing (or mis-performing) routine job duties, is entitled to First Amendment protection if it can be characterized as speech on a matter of public concern. That decision, if allowed to stand, will hamstring local governments in managing their employees, because government employee speech almost always touches upon issues of public concern.

The decision below will thus expose local governments to the expense, inconvenience and workplace disruptions of frequent litigation. And predicting the outcome of that litigation will be difficult, because the balancing of interests that the Ninth Circuit requires turns in large part on a court's view of: (1) the employee's motives; and (2) the societal significance of the employee's speech. Because both issues are subjective, *amicus's* members will be hard-pressed to formulate dependable management guidelines.

Finally, the decision below will upset the legislative judgments that state and local governments have made, in

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[1] The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

hundreds of statutes and ordinances, on the appropriate protection for public "whistleblowers."

SUMMARY OF ARGUMENT

I. Settled principles of agency law establish the right of any employer, public or private, to control the expressive activities of its agents when acting within the scope of their employment. The government's interest in controlling employee speech is no less compelling where the employee speaks off-duty but on job-related subjects and in a manner that associates his speech with of his employment. The Ninth Circuit's decision in this case strips all American governments, federal, State, and local, of their right under agency law to control such speech.

It does so, moreover, without justification in the First Amendment. The Free Speech Clause would never have been understood by its framers and ratifiers as deprecating the government's authority to control employment-related speech by its employees, in their identity as employees. Also, the core interests that animate the First Amendment are at most only weakly implicated by job-related speech. This Court's decisions, including *Pickering* v. *Bd. of Education*, 391 U.S. 563 (1968), *Connick* v. *Myers*, 461 U.S. 138 (1983), and their progeny, likewise provide no support for the Ninth Circuit's ruling. Although those decisions sometimes require courts to balance an employee's expressive interest against legitimate governmental interests when the employee wishes to speak on a matter of "public concern," they need not and should not be interpreted to apply to job-related speech.

II. For managers in public agencies, the Ninth Circuit's misreading of the public concern test, and the resulting application of the *Pickering/Connick* balancing test even to job-related speech, creates crippling uncertainties as to the scope of their authority. Virtually any management decision may be subject to judicial second-guessing. Concurrently, the subjective elements in the public concern test create uncertainty as to the likely outcome in any given case.

The Ninth Circuit below justified application of the public concern test to job-related speech by the public interest served by protecting government whistleblowers. That justification is inapt. As reflected in literally hundreds of whistleblower protection statutes, there are indeed circumstances in which society is well served by protecting those in a position to disclose wrongdoing or waste in government. But because that interest primarily involves law enforcement concerns, rather than First Amendment values, it is weaker than the government's interest in being able to supervise its employees. For the same reason, considerations of federalism and separation of powers counsel that the Court be cautious in supplanting state and federal whistleblower protection statutes.

STATEMENT OF THE CASE

Richard Ceballos, a Deputy District Attorney, in the routine performance of his duties, questioned the prosecution of a murder case and the veracity of a police officer's affidavit. He alleges that adverse employment actions were taken in response to this expressive conduct, and that those actions violate the First Amendment.

In the courts below, Ceballos invoked the two-step analysis established by this Court to determine whether adverse action taken against a public employee violates the First Amendment. The first step, the so-called "public concern test," determines whether the First Amendment applies at all. *Connick*, 461 U.S. at 146. Under this test, if it is determined that the employee spoke "as a citizen," and on matters of "public concern," his speech has First Amendment protection. *Id.* If his speech is found protected, a court must then balance the government's (and society's) managerial interests against the employee's (and society's) First Amendment interests (the "*Pickering/Connick* balance").

This Court has never held that public employee speech that constitutes routine job performance can pass the public concern test. The District Court below held that purely job-

related, on-the-job speech by definition cannot pass the public concern test and is therefore not subject to the *Pickering/Connick* balancing test. But the Ninth Circuit reversed, holding that even routine, on-the-job speech satisfies the public concern test if that speech touches on subjects of societal interest, and particularly where that speech includes alleged disclosure of official misconduct. Pet. App. 19. The Ninth Circuit's holding deepened an existing conflict among the circuits on this question.

ARGUMENT

This Court "has not specifically addressed the issue of whether speech in the course of and as a part of an employee's ordinary duties is or is not per se protected." *Koch* v. *Hutchinson,* 847 F.2d 1436, 1442 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988). Similarly, "it was, and is, not clear that when an individual presents himself as speaking in his capacity as a public employee, that his speech is protected." *DiMeglio* v. *Haines*, 45 F.3d 790, 805 (4th Cir. 1995).

We support Petitioner's view that speech that constitutes job performance by definition does not pass the public concern test, and that the Ninth Circuit's decision should for that reason be reversed. We also believe, however, that the correct definition of "job-related" speech to which the First Amendment does not apply is broader than purely on-the-job speech. Lest the Court decide this case on a basis that suggests a narrower understanding of that term, we explain below the analysis that in our view should guide the Court's decisions in this and similar cases.

Specifically, as discussed below in Section I, we believe the government's legitimate and essential managerial interests necessarily outweigh First Amendment concerns, and thus the public concern test can never be satisfied, if the employee has spoken (a) *as an employee* (rather than as a member of the general public) and (b) on issues *directly and substantially related to the subject matter of his employment.* Our shorthand term for speech that meets this definition is "job-related" speech. Further, and again contrary to the Ninth Circuit's opinion below, we do not believe that First Amendment concerns are significantly greater where job-related speech includes allegations of official wrongdoing. Section II explains why we believe this approach comports with sound public policy and federalism principles.

I. Whatever Protections the First Amendment May Provide For Non-Job Related Speech, It Does Not Protect Job-Related Speech by Public Employees.

In *Connick* this Court held that public employee speech concerning a personal employment grievance is not protected by the First Amendment. In so holding, the Court noted that speech of that description is a far cry from the kind of open debate on issues of public concern that primarily animates the First Amendment's guarantee of free expression. 461 U.S. at 148. The Ninth Circuit, misreading *Connick*, held below that First Amendment protection extends even to employee speech that occurs in the routine performance of job duties. The effect of that ruling is to subject almost any adverse employment decision by a public employer to constitutional scrutiny. Because that result is justified neither by the First Amendment's original purpose, nor by this Court's caselaw, nor by the values served by the First Amendment, the Ninth Circuit's decision represents an unwarranted imposition on the ability of public employers to manage their employees.

A. As Originally Understood, the First Amendment Did Not Prevent Public Employers From Disciplining Public Employees for Speech.

The Framers left us little evidence of their understanding of the First Amendment's Free Speech clause. The House debate is limited and not on point, and no record exists of debate in the Senate or in the various states during ratification. To determine the original meaning of the Free Speech clause, we must therefore examine accepted practices during the relevant times. *See Lynch* v. *Donnelly*, 465 U.S.

668, 673 (1984); *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 372 (1995) (Scalia, J., dissenting).

As an initial matter, those practices demonstrate that the Framers did not understand the Free Speech clause as an absolute. As Justice Story famously put it, "That [the First] [A]mendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, ... is a supposition too wild to be indulged by any rational man." 3 J. Story, Commentaries on the Constitution of the United States § 993 (Boston: 1833); *see also* 4 W. Blackstone's Commentaries on the Laws of England 151-52 (2d rev. ed. 1872) ("The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints on publications, and not in freedom from censure in criminal matter when published").

Consistent with that view, the practice of conditioning government employment on the relinquishment of free-speech rights was common and accepted from the earliest days of the republic until quite recently. As this Court recounted in *United States Civil Service Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973), a "spoils system," under which federal employment "depend[ed] upon party service and changing administrations, rather than meritorious performance," endured from the time of the American government's formation until after the Civil War. And President Jefferson, who famously argued for an absolute interpretation of First Amendment rights during the controversy over the Alien and Sedition Acts, did not view limits on public employees' free-speech rights as offensive to the Free Speech clause. Jefferson approved an order that broadly banned officers of the Executive Branch from participating in "electioneering" or in any way attempting "to influence the votes of others." *Id.* (quoting 10 J. Richardson, Messages and Papers of the Presidents 98-99 (1899)).

Until this Court's groundbreaking decisions in the 1950s and 1960s, the Court's "unchallenged dogma" permitted the government to condition employment upon a wholesale restriction of free speech. *Connick*, 461 U.S. at 143-44 (citations omitted). The prevalent view was perhaps best captured in Justice Holmes' famous dictum that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220 (1892) (Holmes, J.).

To be sure, this Court has abandoned the Holmesian approach and extended some level of First Amendment protection to the speech of government employees. *See, e.g., Pickering*, 391 U.S. at 568. In so doing, however, the Court has continued to recognize the strong interests of state, federal and local governments in regulating their employees' speech. *Id.* ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."). Indeed, nothing in this Court's jurisprudence justifies an extension of First Amendment protections to the statements of a government employee who is speaking as an employee on job-related subjects.

B. Contrary to the Ninth Circuit's Ruling, this Court's Decisions Do Not Require First Amendment Protection for Job-Related Speech.

This Court's decisions provide no support for the Ninth Circuit's holding that job-related speech can pass the public concern test. That holding misconstrues the public concern test, as indicated by Judge O'Scannlain in his concurrence below (App. at 32 et seq.), and by the Fifth Circuit in *Gillum* v. *City of Kerrville*, 3 F.3d 117 (5th Cir. 1993). The *Gillum* court stressed that the public concern test does not "focus on the inherent 'importance' of the subject matter of the speech, but on the extent to which the terminated employee spoke as a citizen or employee." This focus "on the hat worn by the

employee when speaking rather than upon the importance of the issue," the court noted, "reflects the reality that at some level of generality almost all speech of state employees is of public concern." And, the court pointed out that its approach is additionally justified by misgivings about "an analytical path that takes judges so uncomfortably close to content based inquiries." 3 F.3d at 121 (citation omitted).

1. Under this Court's decisions, job-related speech that occurs on the job clearly is *per se* unprotected. First Amendment interests are absent here because the government acts as an employer, not as a sovereign. *See Waters* v. *Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) ("Constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign."). We know of no basis, either in the history of the First Amendment or in this Court's jurisprudence, for concluding that the Free Speech guarantee was intended to impair the government's authority as a principal to control the conduct of its agents acting within the scope of their duties.

A *per se* rule that First Amendment protections do not apply to on-the-job speech is also consistent with *Pickering* and its progeny. In *Pickering* itself, the Court held that the First Amendment protected a teacher's public criticism of the school board's efforts to raise public funding. The speech at issue was made off-duty, and was at most only remotely related to Mr. Pickering's job responsibilities. Similarly, in *Connick*, the Court found that the First Amendment did not apply to the efforts of an assistant district attorney who was unhappy with an announced job transfer, to drum up sympathy among her co-workers by circulating a questionnaire. Myers's job necessarily included the resolution of workplace issues and controversies with her co-workers and superiors.

Thus, as the *en banc* Fourth Circuit explained, this Court's decisions in *Pickering* and *Connick* "focus on the capacity of

the speaker" in recognition of the "basic truth that speech by public employees undertaken in the course of their job duties will frequently involve matters of vital concern to the public, [but avoids] giving those employees a First Amendment right to dictate to the state how they will do their jobs." *Urofsky* v. *Gilmore*, 216 F. 3d 401, 407 (4th Cir. 2000) (en banc).

The power of the government to control the on-the-job speech of its employees is also supported by the entire line of cases dealing with restrictions on government-funded speech. For example, as this Court put it in *Rust* v. *Sullivan*, 500 U.S. 173, 199 (1991), "[t]he employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority." *See also Rosenberger* v. *Univ. of Va.*, 515 U.S. 819, 833 (1995) ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee"); *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540 (1983) ("Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for [the Appellee's] lobbying.").

2. Although the Court need not reach the issue here, job-related speech should also be *per se* unprotected when it occurs away from the workplace. The government's interest in regulating on-the-job employee speech is no greater than its interest in regulating employee speech that, although occurring off-duty, is connected to the speaker's employment both by subject matter and by the speaker's self-identification as a government employee. This Court's First Amendment jurisprudence establishes the government's right to regulate speech that meets that description.

That off-the-job, job-related speech is *per se* unprotected by the First Amendment is shown by this Court's caselaw

approving patronage systems, under which employment can be made dependant upon party affiliation (and, thus, upon political beliefs), if party affiliation bears upon workplace efficiency. As the Court put it in *Branti* v. *Finkel*, 445 U.S. 507 (1980), "[i]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Id.* at 517, *citing Elrod* v. *Burns*, 427 U.S. 347, 366 (1976). If "private political beliefs" can be regulated by the government as employer, off-duty speech can be regulated as well.

This Court's decisions in other First Amendment retaliation cases likewise support the application of a *per se* rule to off-duty speech that is linked to the speaker's identity as a government employee. In *City of San Diego* v. *Roe,* 543 U.S.___, 125 S.Ct. 521 (2004), for example, a city policeman was disciplined for, among other things, selling autoerotic videos. While the Court found that this and similar "speech" failed the public concern test because not on a "subject of legitimate news interest," (*Id.* at ___, 125 S. Ct. at 526) the Court also stressed that Roe's "use of [a police] uniform, [a] law enforcement reference in the Web site, [a] listing of the speaker as 'in the field of law enforcement,' and [a] debased parody of an officer performing indecent acts while in the course of official duties" all had the effect of "link[ing] his videos and other wares to his police work. . . " Because Roe "linked" his "speech" to his being a police officer, it "brought the mission of the employer and the professionalism of its officers into serious disrepute." 543 U.S. at ___, 125 S.Ct. at 524.

By contrast, the dispositive finding in *Pickering* was that Pickering's speech was only *indirectly* related to "the fact of [his] employment." 391 U.S. at 574. Likewise, in *United States* v. *Treasury Employees*, 513 U.S. 454 (1995) (*NTEU*), Justice Stevens, speaking for the majority, contrasted protected speech with speech by government employees in

"their official identities." 513 U.S. at 469. Similarly, Justice O'Connor in *NTEU* contrasted protected speech with "speech that by definition does not relate to . . . the employee's status as an employee." 513 U.S. at 480 (citation omitted). (O'Connor, J., concurring in part and dissenting in part). Finally, this Court has repeatedly suggested that the First Amendment does not apply where the employee speaks *as an employee*, by stressing that protection does apply where the employee speaks "as a citizen." *Pickering,* 391 U.S. at 568; *Connick*, 461 U.S. at 140, 154.

3. All of this Court's decisions *allowing* First Amendment protections for employee speech, moreover, involved non-job-related speech. *Connick* itself, for example, involved both job-related and non-job-related speech. One question in Myers's questionnaire asked whether her co-workers had been pressured into working on political campaigns. Because such pressure "constitutes a coercion of belief in violation of fundamental constitutional rights" (461 U.S. at 149 (citations omitted)), this speech touched upon an issue of public concern. At the same time, the issue was in no way connected to Myers's job duties. The subject matter of Myers's position as an assistant district attorney (*id.* at 137), was in no way related to political campaigning.

Similarly, in *Rankin* v. *McPherson*, 483 U.S. 378 (1987), a clerical employee was discharged for commenting that, after the unsuccessful attack on the President's life, she hoped the next attempt would succeed. The comment had nothing to do with Rankin's job. The Court therefore required that the employer carry the burden of proving that her discharge was justified for reasons of workplace efficiency and harmony.

The same was true in *Givhan v W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979). There the plaintiff was "a junior high English teacher." *Id.* at 411. Thus, her job duties in no way involved the subjects on which she had made the "demands" that had led her employer not to renew her employment contract, i.e.: "(1) that black people be placed in the cafeteria

to take up tickets, . . . ; (2) that the administrative staff be better integrated; and (3) that black Neighborhood Youth Corps . . . workers be assigned semi-clerical office tasks instead of only janitorial-type work."). *Ayers* v. *W. Line Consol. Sch. Dist.*, 555 F.2d 1309, 1313 (5th Cir. 1977) (footnote omitted). Accordingly, this Court found her speech protected, and thus subject to the *Pickering/Connick* balance. *Givhan*, 439 U.S. at 410.

Finally, in *Pickering*, Pickering's letters to the editor criticizing School Board policies and communications were not job-related. Mr. Pickering was a teacher, with no involvement in the financing issues on which he spoke. The *Pickering* Court specifically grounded its holding on the finding that "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication." 391 U.S. at 574.

In short, this Court's decisions do not support application of the *Connick/Pickering* balancing analysis to any job-related speech, whether on-the-job or off-duty.

C. Allowing Public Employers the Same Ability As Private Employers To Regulate Their Employees' Job-Related Speech Does No Real Harm to the Interests Protected By the First Amendment.

The rule we advocate is consistent with the values that underlie the First Amendment. As noted by the plurality in *Waters* v. *Churchill*, "many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." 511 U.S. at 672. While this Court has been justifiably chary of efforts to define the "fundamental maxims" of Free Speech, it is helpful, in analyzing the scope of First Amendment protections, to consider the rationales for freedom of expression which are: (1) the role that free and open discussion plays in a self-governing society — in other words, *society's* interest in open debate; (2) the right of free people to seek self-fulfillment *via* self-expression, both as a participant

in self-government, and more broadly, as a free personality; and (3) the search for truth.[2] Where job-related speech is involved, these core First Amendment values are relatively weak, and therefore inferior to the government's interest, as employer, in managing its employees' job performance.

1. *Society's political interests.* Protecting society's political discourse is the heart of the First Amendment. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978) (the Court's precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas"); *Roe*, 543 U.S. at ___, 125 S. Ct. at 525 ("The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.").

Thus, one might well ask whether, if job-related speech is unprotected, the government's authority to regulate job-related speech will deny society potential contributions to public debate. This potential loss of contributions to the public debate, however, is at best minimal. It would involve at most only a limited number of people, and, in all but a very few cases, would be limited to a narrow range of subjects.

Moreover, this Court's cases rejecting First Amendment challenges to the Hatch Act (*Letter Carriers*) and analogous state statutes (*Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973)) stand firmly for the proposition that the public's interest in every citizen's political contributions is inferior to the government's interest in restricting political activity by employees for the sake of good government: "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in

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[2] *See generally* Emerson, *The System of Freedom of Expression* 6-7 (1970); F. Schauer, *Free Speech: A Philosophical Inquiry* (1982); Shriffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U.L. Rev. 1212 (1983).

politics as party officers or workers, we see no constitutional objection." *Letter Carriers*, 413 U.S. at 555, *quoting United Pub. Workers* v. *Mitchell*, 330 U.S. 75, 99 (1974). There is no reason that state and local governments should be accorded less deference. On the contrary, principles of federalism require precisely the opposite.

2. *Political self-expression.* Denying First Amendment protection for job-related speech is also consistent with the value of encouraging political self-expression. The notion that active participation in civic affairs is essential to individual self-fulfillment in a free society is at least as old as Aristotle (*See* Aristotle, *Politics*, §9, ln.s 1253a1-3 ("Ανθροπον πολιτικον ξοον εστι")[3]), and has its modern-day champions.[4] But this Court has firmly established that the government, as employer, may impose broad restrictions on employees' political self-expression without offending the First Amendment.

In *Letter Carriers*, for example, the Court upheld the provision in the Hatch Act that barred any "employee in an Executive agency or an[y] individual employed by the government of the District of Columbia" from "tak[ing] an active part in political management or in political campaigns." *See* 5 U.S.C. 7324 (a) (2). Illustrating the extent of the Hatch

[3] "Man is a political animal." In other words, an essential component in man's full self-realization is participation in the affairs of the *Polis*. Interestingly, for Aristotle, speech itself is the proof. See id. at § 10 ("The reason why man is a being meant for political association . . .is evident. . . Nature . . . makes nothing in vain, and man alone of the animals is furnished with the faculty of language.") *The Politics of Aristotle*, E. Baker Trans., (Oxford 1976), at 5-6. *Compare Herbert v. Lando*, 441 U.S. 153, 183-184 n. 1 (1979) ("Freedom of speech is itself an end because the human community is in large measure defined through speech; . . . This is particularly so in a democracy like our own, in which the autonomy of each individual is accorded equal and incommensurate respect.")

[4] See, e.g., A. Meiklejohn, *Free Speech And Its Relation To Self-Government*, 82-89 (1948); A. Meiklejohn, *Political Freedom*, 73-75 (1960).

Act's restraints on political self-expression, one of the plaintiffs in *Letter Carriers* had brought suit seeking permission for: "(1) participation as a delegate in conventions of a political party; (2) public endorsement of candidates of a political party for local, state and national office; (3) work at polling places on behalf of a political party during elections; (4) holding office in a political club." 413 U.S. at 553 n. 3.

This Court held that these and other essential forms of political participation could properly be barred, partly on the grounds that the statute left "untouched full participation by employees in political decisions at the ballot box...." and did not interfere with a "wide range of [other] public activities." *Letter Carriers*, 413 U.S. at 556, *quoting United Pub. Workers* v. *Mitchell*, 330 U.S. 75, 99-100 (1947); *see also Letter Carriers*, 413 U.S. at 575-576 ("[T]he Act specifically provides that the employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates.").

The import of *Letter Carriers* is that a government employee's First Amendment interest in political self-expression must yield "[i]f, in [the government's] judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers . . ." *Letter Carriers*, 413 U.S. at 555, *quoting United Pub. Workers* v. *Mitchell*, 330 U.S. 75, 99 (1947). This is true, moreover, regardless of whether the speech in question is job-related. Because the government's legitimate interest in restricting job-related speech is obviously greater than its interest in restricting non-job-related speech, the rationale of *Letter Carriers* applies with even greater force to job-related speech.[5]

[5] To be sure, the First Amendment protects a wide range of individual self-expression beyond political expression. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). ("It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' . . . But our cases have never suggested that

3. *The search for truth*. The rule we propose is also consistent with the First Amendment's truth-seeking role. Commonly traced to John Milton and John Stewart Mill,[6] the "truth-seeking function of the marketplace of ideas" (*Hustler Magazine* v. *Falwell*, 485 U.S. 46, 52 (1988)) was most famously introduced to First Amendment jurisprudence by Oliver Wendell Holmes in *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, . . . That at any rate is the theory of our Constitution."). But it is important to identify the truth-seeking values implicated in these cases. The marketplace of ideas is most often thought of as an arena in which matters of policy are debated. The notion is not limited to matters of economics, politics, and the like, but it is in the context of debates on such subjects that the idea of a truth-seeking marketplace of ideas is most commonly invoked. See, e.g., *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of . . .the First Amendment freedoms.").

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expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexclusive list of labels—is not entitled to full First Amendment protection."). But in the broad sense of self-fulfillment, every employee, in taking a job, accepts a host of limitations on how he may present himself and behave. And this Court has never suggested that such restrictions pose any threat to First Amendment values. For example, the "Court [has] never expressed doubt that a government employer may bar its employees from using ... offensive [language] to members of the public, or to the people with whom they work."). *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion) *discussing Cohen v. California*, 403 U.S. 15, 21-25 (1971); *cf. Kelley v. Johnson*, 425 U.S. 238 (1976) (approving restriction on police officer's hair length). In its broad, non-political sense, the First Amendment value in self-expression is therefore inferior, in the workplace, to an employer's interest in maintaining workplace efficiency and decorum.

[6] *See* J. Milton, *Areopagitica* (London 1644), in 2 *Complete Prose Works Of John Milton* 486 passim (E. Sirluck ed. 1959); J. Mill, *On Liberty*, in *On Liberty And Considerations On Representative Government* 1, 13-48 (R. McCallum ed. 1948)

This is not the kind of debate to which this Court's ruling would likely apply. Here, the issues raised by Ceballos had to do with proper administration of the DA's office and possible misconduct by a police officer. These matters no doubt have broad political and social implications, but their core significance is a matter of potential misfeasance (by Ceballos's superiors) and malfeasance (by the deputy sheriff), not broad issues of public policy. In this arena, then, First Amendment values are outweighed by public employers' legitimate and compelling interest in regulating job-related speech.

II. Applying the *Pickering/Connick* Balance to Job-Related Speech Imposes Serious Burdens on State and Local Governments.

The Ninth Circuit's approach, moreover, would impose enormous burdens on governments at all levels. In *Connick*, this Court held that employee speech that constitutes "an employee grievance concerning internal office policy" (461 U.S. at 154), as contrasted with "matter[s] of public concern" (*id.* at 146), enjoys no First Amendment protection. But some circuits, including the Ninth Circuit below, have transformed the holding of *Connick* into a sweeping rule that the First Amendment protects any and all employee speech that touches on matters of "public concern," *even if that speech constitutes job performance.* The resulting application of the *Pickering/Connick* balancing test to job-related speech would strip public employers of their necessary and legitimate ability under settled principles of agency law, to control the actions of their employees on matters within the scope of their agency. It would also create significant legal uncertainty for public employers, and effectively preempt the efforts of state and local legislatures to provide appropriate protections to whistleblowers.

A. Application of the Public Concern Test to Job-Related Speech Inappropriately Strips From Public Employers the Necessary and Important Right Of Any Principal To Control the Speech of Its Agents.

As Justice Powell put it in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974): "[I]f [it] is to perform its responsibilities effectively and economically . . . the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." 416 U.S. at 168 (Powell, J, concurring). The Ninth Circuit's analysis seriously undermines this authority. A ruling by this Court that job-related speech by government employees is not protected by the First Amendment will restore the ability of state and local governments to "perform [their] responsibilities effectively and economically."

In this case, for example, if an assistant district attorney refuses to follow the DA's instructions when making a public statement about an upcoming murder trial, "[i]t cannot seriously be doubted that the assistant does not possess a First Amendment right to challenge his employer's instructions regarding the content of the statement." *Urofsky* 216 F. 3d at 407-408. While the subject of the speech is certainly of great public interest, the government as employer has a compelling interest in controlling how the employee does his job. For federal, state and local governments, it would be a disaster to "giv[e their] employees a First Amendment right to dictate to the state how they will do their jobs." *Id.* at 407. But by extending First Amendment protection even to "on-the-job, work-related speech," App. at 8 n. 4, the decision below confers precisely that right.

1. Principles of agency demonstrate that employees have no such right at common law. An employee, acting within the scope of his duties, speaks for his employer. A principal

necessarily has the power to control an agent's statements made on the principal's behalf. *See Restatement (Second) of Agency* (1958) ("*Restatement*"), Chapter 7, Topic 2, Title B, Introductory Note ("But it must not be overlooked that the relation of master and servant is a type of agency. All of the general agency principles are applicable to it."). *See also Gen. Bldg. Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375, 392 (1982) ("'A master-servant relationship is a form of agency in which the master employs the servant as 'an agent to perform service in his affairs…'") *quoting Restatement* § 2 (citation omitted). Because the employee, as agent, speaks for his employer, any First Amendment restriction on the employer's ability to control that speech would amount to an assertion of constitutional rights by the employer against itself, an evident absurdity.

Ceballos's speech in this case concerned a decision whether to continue, or dismiss, a criminal prosecution, and potential misconduct by a police officer. For an assistant district attorney, such discussions are routine aspects of the job. On such matters a prosecutor's office must set and maintain a decision-making process that defines who has input and when. But the Ninth's Circuit's view would result in the employees having considerable authority to define that process, because their input, however inappropriate, will be constitutionally protected.

2. The government has an equally compelling interest in regulating speech that, while not constituting job performance, bears directly enough upon the subject matter of the employee's job that the manner or content of that speech, if inappropriate, will naturally have a direct, negative impact on the reputation or operations of the employer. The appropriate test was suggested in *Pickering* by the finding that "the fact of [Pickering's] employment is only tangentially and insubstantially involved in the subject matter of the public communication." *Pickering*, 391 U.S. at 574. Conversely, the burden on public authorities is considerably greater where the "fact of employment" is directly and

substantially "involved in the subject matter of the public communication."

The government's management prerogatives must encompass such off-duty speech lest meaningless distinctions dictate results. To illustrate, consider the following variations on the facts of the instant case:

1. Ceballos protests, directly to his superiors and co-workers, that a particular prosecution is ill-advised;
2. On the courthouse steps, speaking to reporters after a prosecution has been dismissed, Ceballos states his opinion that the prosecution had been ill-advised;
3. The day following a prosecution has been dismissed, Ceballos writes a letter to the editor stating his opinion that the prosecution had been ill-advised.

In examples (1) and (2), Ceballos is doing his job, and therefore the government has an obvious interest, as an employer, in deciding whether its agent is performing well or poorly. In (3) Ceballos is not doing his job, but no meaningful distinction can be drawn between (2) and (3), because the workplace impact of the speech is likely to be the same, if not greater. The employer's interest is therefore equally if not more powerful, and legitimately so. His speech, therefore, should be considered "job-related," just as it is in examples (1) and (2).

This conclusion is consistent with the plurality opinion in *Waters* v. *Churchill*, 511 U.S. 661, 672 (1994) (plurality opinion) which recognized that the government's interest in controlling off-duty speech can be just as great as its interest in controlling speech that constitutes job performance: "[T]hough a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing." Yet, on the Ninth Circuit's reasoning, under which *any* speech on topics of public concern is protected, the

President would have to justify, under First Amendment scrutiny, a decision to discharge a White House press secretary who publicly ridiculed the President's policies. That is absurd.

3. As we have noted, a second question that significantly implicates the employer's interests is whether the employee speaks in the *persona* of a government employee. Justice O'Connor's example of a "high ranking deputy" criticizing the governor's policies, *id.*, quite properly makes no distinction between on-the-job speech and off-duty speech. Instead, the governing aspect of "job-relatedness" in this example is the fact that a listener would associate the speech with the speaker's position as a government employee.

As employer-principals, state and local agencies have a powerful interest in regulating conduct that has the potential to bring "the[ir] mission . . . and the professionalism of [their] officers into serious disrepute." *Roe*, 543 U.S. at ___, 125 S.Ct. at 524; *See Restatement* § 380 ("[A]n agent is subject to a duty not to conduct himself with such impropriety that he brings disrepute upon the principal or upon the business in which he is engaged."). That potential exists wherever the employee's speech is linked to his position as government employee, and relates to the subject matter of his employment.

Principles of agency confirm the employer's right and need to control an employee's speech in the *persona* of the employee. An employee is a fiduciary. *Gen. Bldg. Contractors,* 458 U.S. at 393 ("At the core of agency is a 'fiduciary relation' arising from the 'consent by one person to another that the other shall act on his behalf and subject to his control'"), *quoting Restatement* § 1; *Restatement* § 13 ("An agent is a fiduciary with respect to matters within the scope of his agency."). As a fiduciary, an employee cannot exploit for personal advantage knowledge – or even status – gained as an employee. *Carpenter* v. *United States,* 484 U.S. 19, 27-28 (1987); *Snepp* v. *United States*, 444 U.S. 507, 515-16 (1980)

(imposing constructive trust on sales proceeds from former CIA agent's book, partly on grounds of his breach of fiduciary duties).[7]

In short, the government as employer therefore must be able to regulate employee speech that is related to employment both by subject matter and by the speaker's wearing the mantle of his employment.[8] Thus, when a government employee speaks *as an employee*, and *on the subjects of his employment,* the government, as employer, has a compelling interest in being able to restrain speech that can have a negative impact on its operations and reputation.

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[7] Fiduciary principles apply equally where an employee seeks to exploit his *status* as an employee, as opposed to exploiting knowledge gained as an employee. *Cf. Restatement* § 404 & Comment b (agent liable to principal for use of principal's "assets," which include "good will, credit, and other intangible assets of the principal"); *id.* § 387 ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with the agency."). As noted by the Sixth Circuit: "[N]o court has recognized a right to exploit one's rank in public employment solely for the purpose of enhancing credibility for personal or political gain — in effect, to use the fact of public employment as a 'soap box' from which the employee can advocate a political position on an issue of public debate." *Thomas* v. *Whalen*, 51 F.3d 1285, 1291 (6th Cir. 1995). This accords with this Court's emphasis in *Roe* upon the fact that Roe "linked" his speech to his status as a police officer. 543 U.S. at ___, 125 S.Ct. at 524. Like the police officer in *Whalen*, who exploited his position to promote his political views, Roe effectively misappropriated the fact of his police employment to promote his wares. *Id.* at 526 ("Roe's expression was . . .designed to exploit his employer's image.").

[8] This conclusion accords with the principle of agency law that governs partially disclosed principals. The pertinent rule is that an agent binds his principal, even though he "makes . . . promises in the first person," and even though "the name of the principal is not specifically mentioned," so long as: (1) "the other person *knows the agent to be an employee* or representative of the principal *and [2] the transaction is one within the area of the principal's business.*" *Restatement*, Ch. 6, Topic 2, Introductory Note (emphasis added).

Moreover, the government's interest in regulating speech that meets that description is no weaker than its interest in regulating on-the-job speech.

B. Subjecting Job-Related Speech to the Public Concern Test Creates Significant Legal Uncertainty for Public Employers.

The Ninth Circuit's approach is also problematic because virtually any job-related speech by a public employee touches on matters of "public concern" (as the Ninth Circuit uses that term), and because the resulting First Amendment scrutiny of almost any adverse employment action premised on a public employee's job-related speech will produce unpredictable results.

Unpredictability is inevitable, first, because the public concern test hangs, in many cases, on the question of the speaker's intent. *See, e.g., Conaway* v. *Smith*, 853 F.2d 789, 796 (10th Cir. 1988) (Issue is whether plaintiff's speech "was calculated to disclose misconduct" or to inspire public debate on some issue of significant public interest); *Linhart* v. *Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) (*Connick* "requires us to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?").

The importance of the speaker's intent under the public concern test, moreover, underscores the need for deference to managerial judgments where job-related speech is involved. Where a manager, based on months or years of interaction with an employee, and intimate knowledge of the circumstances, concludes that an employee's criticisms reflect intolerable insubordination, or poor judgment, or are intended (inappropriately) to advance personal interests, it makes little sense for a court, on the basis of a few day's testimony, to second guess that judgment.

Application of the public concern test will also be unpredictable because it will often reflect a court's personal view of the social or political importance of the "public" issue. *See, e.g., Egger* v. *Phillips*, 710 F.2d 292, 316-17 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983). ("[I]n assessing whether the speech touches upon a matter of public concern, it is important not to equate the public's curiosity about a matter with *a matter having societal ramifications*") (emphasis added). In related contexts the Court has anticipated, and attempted to avoid, this very problem. In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held that First Amendment limits on liability for defamation should be determined on the basis of whether the plaintiff is a public figure, not whether the plaintiff's speech addressed a subject of public concern. The Court noted the "difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not," and expressed "doubt [about] the wisdom of committing this task to the conscience of the judges." 418 U.S. at 346.

Finally, the public concern test is easily manipulated by employees. Indeed, Myers's questionnaire in *Connick* may have included a question about political abuses specifically to put a patina of public concern on an initiative that "is most accurately characterized as an employee grievance concerning internal office policy." *Connick*, 461 U.S. at 154.

The unpredictability of results in these cases makes it impossible for state and local governments to provide reliable guidance to their managers, and also multiplies the amount of time and resources those managers must devote to defending lawsuits instead of doing their jobs, because "[u]ncertainty breeds litigation." *Bd. of County Comm'rs, Wabaunsee County, Kansas* v. *Umbehr*, 518 U.S. 668, 698 (1996) (Scalia, J., dissenting).

C. Subjecting Job-Related Speech to the Public Concern Test Impinges Upon the Prerogative of State and Local Legislatures to Determine the Appropriate Scope of Legal Protections Provided to "Whistleblowers."

Application of the public concern test to job-related speech also impinges upon the legislatures' prerogative to determine the nature and scope of protections for "whistleblowers." Like this case, a significant number of all First Amendment retaliation cases involve alleged whistleblowing. Indeed, in their efforts to invent workable limitations on the potentially unlimited scope of the *Connick/Pickering* balance, some lower courts have somewhat arbitrarily announced that the public concern test is particularly designed for the benefit of government whistleblowers. *See Koch*, 847 F.2d at 1445-46 ("After *Connick*, many courts have particularly focused on the extent to which the content of the employee speech was calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of governmental officials in the conduct of their official duties") (15 citations omitted). The Ninth Circuit below adhered to this philosophy. App. A at 19 ("[T]he decisive question is whether the employee spoke with the intention of bringing wrongdoing to light…").

Without question, there are circumstances in which the public's interest in disclosure of government waste or wrongdoing is superior to its interest in the unhampered functioning of its agencies. But the fact that job-related speech includes whistleblowing does not, as the Ninth Circuit suggests, add decisive weight to its claim to First Amendment protection.

1. The interests promoted by whistleblower protection laws are principally those of law enforcement and government efficiency, not the protection of speech. As noted in one comprehensive review of whistleblower legislation, whistleblowing "is viewed as a mechanism to regain societal

control over the large organizations that have come to dominate the global community." Legislative protections for whistleblowers are therefore designed to "empower[] an individual to report mistakes or wrongdoing to a person or agency that can correct the problem." The purposes of this empowerment have to do, however, with effective law enforcement, not free speech values, because the goals of protection are: (a) "exposing misconduct," (b) "allow[ing] for early detection and reduction of harm," (c) "reduc[ing] the necessity for and expense of public oversight and investigation," and (d) "deter[ring] malfeasance." Callahan, Dworkin, & Lewis, *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 Va. J. Int'l L. 879, 881-2 (Spring, 2004). These are not constitutional interests.[9]

To be sure, in some cases whistleblowing may also involve commentary on broad political issues. However, in the more common situation, as in this case, the public interest in protecting whistleblowing is based upon law-enforcement needs, not constitutional norms. We do not protect the whistleblower in cases such as this one because blowing the whistle on one's superiors or co-workers is essential either to society's political discourse or to its members' self-fulfillment.[10]

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[9] That the First Amendment is not intended as a tool for detecting misconduct is shown by the fact that privilege laws routinely enforced by this Court give to several classes of citizens — including attorneys, psychiatrists, priests, and accountants — a positive duty to withhold evidence of wrongdoing. We are aware of no decision suggesting that the validity or scope of privileges such as these depends upon their passing any form of First Amendment scrutiny. Similarly, the First Amendment free association clause confers a privilege to refuse disclosure of membership in organizations, *see NAACP v. Alabama*, 357 U.S. 449, 462 (1958), and the Fifth Amendment provides the accused a constitutional right to withhold evidence of wrongdoing.

[10] It is true that, in *Connick* (461 U.S. at 148) this Court observed in *dicta* that "Myers did not seek . . . to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others,"

Because it is not readily apparent that First Amendment values are substantially implicated in whistleblower speech, the Ninth Circuit erred in suggesting that the presence of whistleblowing necessitates constitutional scrutiny in cases of job-related speech by public employees. That conclusion is all the more compelling where, as we now show, imposition of constitutional scrutiny would run contrary to federalism and separation of powers concerns.

2. All fifty states, and the District of Columbia, have enacted whistleblower protection laws.[11] The need for

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suggesting that whistleblowing may implicate First Amendment concerns. We submit, however, that the goals of whistleblower protection legislation indicate that the presence of whistleblowing does not provide an appropriate trigger for First Amendment scrutiny.

Also, while *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) certainly establishes that society has a strong First Amendment interest in the *media's* freedom to criticize public officials robustly (*see Time, Inc.* v. *Firestone*, 424 U.S. 448, 456 (1976) (discussing the "appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances"); *Philadelphia Newspapers* v. *Hepps*, 475 U.S. 767, 777 (1986) ("the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern,") the Court has never held that *New York Times v. Sullivan*, or its progeny, applies to non-media defendants. *Id.* at 794 n. 4; *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133 f n. 16 (1979).

[11] Forty-seven states, and the District of Columbia, have adopted whistleblower legislation that provides general protection to government employees. *See* Westman & Modesitt, Appendix A, 281-307. In the three remaining states, New Mexico, Vermont and Virginia, several whistleblower protection laws target specific provisions of law or industries. See N.M. Stat. Ann. § 28:17-19 (Michie 1996); N.M. Stat. Ann. § 30-47-9 (Michie Supp. 1997); N.M. Stat. Ann. § 50-9-25 (Michie 1993); N.M. Stat. Ann. § 74-3-16 (Michie 1996); Vt. Stat. Ann. tit. III § 961 (1988); Vt. Stat. Ann. tit XXI § 231 (1988); Vt. Stat. Ann. tit. XXI § 232 (Supp. 1997); Vt. Stat. Ann. tit. XXI § 494d (1988); Vt. Stat. Ann. tit. XXI § 495 (1988 & Supp. 1997); Vt. Stat. Ann. tit. XXI § 1726 (1988 & Supp. 1997); Vt. Stat. Ann. tit. XXXIII § 7508 (1991); Va. Code Ann. §§ 40.1-51.2.1 (Michie 1994); Va. Code Ann. §§ 63.2-1730 (Michie 1995); Va. Code Ann. §§ 8.01-216.8 (2002); Va. Code Ann. §§ 63.2-1731 (Michie 1995); Va. Code Ann. §§ 32.1-138.4 (Michie 1997); Va. Code

respecting legislative prerogatives, and state sovereignty, is highlighted by the fact that states and local governments have taken a wide variety of approaches in attempting to balance employee protection against management prerogatives.

The Florida whistleblower statute, for example, requires that the employee show that there is, in fact, a violation of a statute. *See Taylor* v. *Memorial Health Systems, Inc.*, 770 So.2d 752, 754 (Fla. App. 5 Dist. 2000) (interpreting Fla. Stat. Ann. § 448.101-102 (West 1981 & Supp. 1995)). Eleven states' statutes (Florida, Idaho, Indiana, Louisiana, Maine, Massachusetts, New Jersey, New Hampshire, New York, Ohio, and Wyoming) limit protection to employees who first inform their employer, and allow the employer the opportunity to correct the problem, before contacting external authorities. Daniel P. Westman & Nancy M. Modesitt, *Whistleblowing: The Law of Retaliatory Discharge*, 69-70 (2d ed. 2004).

Ann. § 54.1-515 (Michie 1994). In addition, courts in these three states have created public policy exceptions to the at-will employment doctrine which, in at least one instance, extends protection to whistleblowers. *See, e.g., Vigil v. Arzola*, 699 P.2d 613 (N.M. App. 1983), *rev'd on other grounds*, 687 P.2d 1038 (N.M. 1984), overruled on other grounds, 777 P.2d 371 (1989) (protecting employee who reported inappropriate use of federal funds).

While our discussion of this issue will focus on *state* whistleblower protection statutes the arguments are fully pertinent to local governments as well. Several municipalities have adopted ordinances that protect whistleblowers. See, *e.g.*, St. Paul Admin. Code § 42.01 (protecting city employees who, in good faith, report violations of any law or regulation); San Antonio Mun. § 36-10 (protecting any employee, applicant or customer from retribution for reporting a violation of a particular city ordinance); Denver Mun. § 24-314 (same). In addition, state statutes commonly extend whistleblower protections to municipal, as well as state, employees. See, *e.g.*, Ark. Code Ann. § 21-1-601 et seq. (Michie 2003); La. Rev. Stat. Ann. § 42:1169 (West 2003); Miss. Code Ann. § 25-9-171 et seq. (2003).

The New Jersey and Texas whistleblower statutes, by contrast, have been construed to apply only where illegal activity that harms the public is involved, and thus not to internal policies. *Littman* v. *Firestone Tire & Rubber* Co., 715 F. Supp. 90, 93 (S.D.N.Y. 1989); *City of Houston v. Kallina*, 97 S.W.3d 170, 174 (Tex. App.-Houston [14 Dist.] 2002). States have also taken differing approaches to allocating the burden of proof. *Compare Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 251 (Ky. App. 2004) *with Raphael v. Okyiri*, 740 A.2d 935, 957 (D.C. 1999). And in some states, protection is withdrawn where the whistleblower acts in "consideration of personal benefit." Pa. Stat. Ann. tit. 43, §1422 (West 2003); W. Va. Code, §6c-1-2 (1988). Wisconsin protects those acting for gain only if the government has offered the award to improve administration or operations. Wis. Stat. 230.83(2) (2003).[12]

For all these reasons, any attempt to base First Amendment protections on the public interest potentially served by protecting whistleblowers threatens to interfere with an extensive range of carefully made legislative policy judgments. Yet there is no compelling justification for such interference, because the values primarily at stake — ferreting out waste and wrongdoing in government — are not constitutional values. Where as here constitutional values are at most only weakly implicated, this Court would do well to refrain from extending constitutional scrutiny into areas where legislative efforts have been so extensive.

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[12] Some States have also adopted whistleblower statutes that apply specifically to the employees of municipal governments. *See, e.g.*, Cal. Gov't Code § 53298(a) et seq. (Deering 2003); Wash. Rev. Code Ann. § 42.41.010 et seq. (West 2003). In some cases, these States have concluded that greater protection is appropriate for employees of lower levels of government than for employees of the State. *See, e.g.*, Conn. Gen. Stat. Ann. § 31-51m(b) (West 2003).

Judicial restraint is all the more fitting where, as here, legislatures are better equipped than courts to determine the circumstances in which employees' job-related criticisms of their employer should be protected, and the extent of that protection. Unlike the judiciary, legislatures can (and do) address the problem in a comprehensive manner that makes appropriate distinctions between types of employees, types of criticisms, areas of employment, and other relevant factors. Judges, by contrast, will have to balance the competing values on a case-by-case basis, yielding results that are less consistent and less predictable than those typically produced where standards are spelled out by statute. The Ninth Circuit's approach thus unnecessarily over-rides the policy decisions that federal, state and local legislatures have crafted in literally hundreds of statutes and ordinances, in an area well-suited to legislative decision-making.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

HENRY W. UNDERHILL, JR.
LANI L. WILLIAMS
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
1110 VERMONT AVENUE, N.W.,
SUITE 200
WASHINGTON, DC 20005
(202) 466-5424

GENE C. SCHAERR*
LINDA T. COBERLY
PETER KRYN DYKEMA
EDWIN H. CALDIE
WINSTON & STRAWN LLP
1700 K STREET, N.W
WASHINGTON, D.C. 20006
(202) 282-5000

Counsel for Amicus Curiae

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* Counsel of Record

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IN THE

Supreme Court of the United States

GIL GARCETTI, *et al.*,
Petitioners,

v.

RICHARD CEBALLOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 309
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether a deputy district attorney's speech about a pending criminal case is protected by the First Amendment as speech by a citizen on a matter of public concern.

2. Whether the government's interest in promoting the efficiency of the work of a district attorney's office outweighs a deputy district attorney's interest in disclosing to defense counsel his conclusions and opinions about the prosecution's evidence.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in protecting "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

While *amici* fully respect the constitutional right of their employees "as . . . citizen[s] in commenting upon matters of public concern," *id.*, that is not what occurred here. All of the speech for which respondent Richard Ceballos now claims First Amendment protection was engaged in as a member of a team of attorneys prosecuting a criminal case.

During that prosecution Ceballos concluded that the DA's office had an obligation to disclose to the defense not only potentially exculpatory evidence but also his own conclusions and opinions about the prosecution's evidence—in particular a key affidavit—even though attorney conclusions and opinions are privileged under the California work product doctrine. Ceballos openly disagreed with his supervisors, petitioners Frank Sundstedt and Carol Najera, about the scope of the office's disclosure obligations. By his own account, he unilaterally "informed defense counsel that he believed the affidavit contained false statements," Resp. Br. in Opp. 5, and "refused" to follow Najera's express instructions about the manner in which potentially exculpatory evidence should be disclosed. *Id.*

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[1] The parties have consented to the filing of this *amicus curiae* brief and their letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

None of the speech for which Ceballos claims First Amendment protection was engaged in as a citizen. Rather, it was solely that of a Deputy District Attorney, engaged in the duties of his office. Those duties included following the instructions of his supervisors, particularly where, as here, both Sundstedt and Najera consistently treated Ceballos's beliefs about the veracity of prosecution evidence with utmost gravity, and their decisions and instructions to him were in full accord with federal and state law.

As this Court has noted, "it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors." *Connick v. Myers*, 461 U.S. 138, 151 (1983) (internal quotations and citation omitted). By Ceballos's own account, his speech as a Deputy District Attorney "impair[ed] discipline by superiors [and] harmony among co-workers" and "interfere[d] with the regular operation" of the DA's office. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

Because of the importance of these issues to the effective operation of a core function of state and local governments, *amici* respectfully submit this brief to assist the Court in its resolution of this case.

STATEMENT OF THE CASE

Respondent Richard Ceballos has been a Deputy District Attorney in the Los Angeles County District Attorney's Office since 1989. *See* Resp. Br. in Opposition ("Opp.") 3.[2] In 1997 or 1998, two or three years before the events that

[2] Because he is opposing petitioners' motion for summary judgment, the facts must be viewed in the light most favorable to Ceballos. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992). Much of the material in this statement is therefore taken from the statement in Ceballos's brief in opposition to the petition for certiorari, Opp. 3-6.

gave rise to this case, Ceballos was assigned to the Pomona Branch of the DA's office. *See id.* "[A]bout a year later," he "was promoted to calendar deputy, a prestigious position affording him supervisory responsibility over more junior Deputy District Attorneys." *Id.*

In early 2000, Ceballos was contacted by defense counsel representing one of the defendants in *People v. Cuskey*, a case being prosecuted by a Deputy District Attorney under Ceballos's supervision. *See id.* Defense counsel "asked [Ceballos] to investigate whether one of the arresting Deputy Sheriffs had lied in an affidavit he swore out to obtain a search warrant." *Id.* "Ceballos agreed to look into it." *Id.*

Ceballos "review[ed] the evidence, visit[ed] the crime scene, . . . discuss[ed] the matter with colleagues in [the District Attorney's] office," and met "with his direct supervisor, Carol Najera, and her superior, Head Deputy District Attorney Frank Sundstedt." *Id.* As a result of his investigation, "Ceballos determined that the affidavit was indeed false and misleading." *Id.* His "colleagues and supervisors agreed [with Ceballos] that the validity of the warrant was questionable." *Id.*

"On March 2, 2000, Ceballos provided Sundstedt a memorandum, or disposition report, discussing his assessment that the Deputy Sheriff had relied on inaccurate and misleading information provided by other officers and falsified his affidavit. . . ." *Id.* at 3-4. In his disposition memorandum "Ceballos recommended [to Sundstedt] that the case be dismissed." *Id.* at 4. Ceballos's March 2 memorandum also informed Sundstedt that "[a] motion to traverse [the] search warrant has been filed and is set for hearing on March 6, 2000."[3] J.A. 496. The defense motion, by Ceballos's

[3] The hearing on the motion to traverse was actually held on March 20. *See* J.A. 198. A motion to traverse is a pre-trial proceeding that affords criminal defendants an opportunity to contest the seizure of evidence by,

account, "allege[d] that the affiant . . . deputy sheriff . . . made statements or omissions of fact in the search warrant 'that were deliberately false or in reckless disregard of the truth.'" *Id.*

Ceballos's March 2 disposition memorandum "minced no words" in setting forth his opinion about the truthfulness of the affiant Deputy Sheriff—Ceballos flatly "accused the Deputy Sheriff of having committed perjury." Opp. 4. In addition, Ceballos's disposition memorandum "charged misconduct" both "on the part of the affiant [Deputy Sheriff] and other law enforcement officers." *Id.*[4]

Petitioner Frank Sundstedt "treated the [memo] as exceptional." *Id.* at 4. Sundstedt "directed Ceballos to revise the memorandum and make it less accusatory of the Deputy

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inter alia, "challeng[ing] the truth of the factual contents of the affidavits" on which search warrants are based. *Williams v. Justice Court*, 230 Cal. App. 2d 87, 97-98 (3d Dist. 1964). *See id.* at 96 (defendant "who 'controverts'" the grounds of a search warrant "may do so . . . by traversing the truth of the search warrant affidavit").

[4] At the hearing on petitioners' motion for summary judgment, the district court made several findings about Ceballos's March 2 disposition memorandum based on the representations and admissions of Ceballos's attorney. For example, Ceballos's lawyer admitted "that a 'disposition memo,' which is what Ceballos prepared on March 2, 2000 is common" in the District Attorney's office. Pet. App. 64a. "Indeed," the court added, Ceballos "admits that it was 'pursuant to his duties as a prosecutor . . . [that] he wrote the memo expressing his concerns about the veracity of the officers in this case.'" *Id.* (citing Plaintiff's Statement of Genuine Issues, ¶ 4). The district court further noted that "[i]n a commendable display of candor, [Ceballos's] counsel reiterated that admission at the hearing." *Id.*

The court also found that in the disposition memorandum "Ceballos requested 'permission to dismiss the information [i.e., the charges] against defendants'" and that Ceballos thus "obviously recognized that he needed Sundstedt's permission to [dismiss the charges], which reinforces the conclusion that the memorandum was prepared as part of his job." Pet. App. 64a-65a n.5.

Sheriff, particularly because the memorandum was to be shared with the Sheriff's Department." *Id.*[5]

Ceballos prepared another memorandum to Sundstedt on March 6, 2000. *See id.* In this memorandum Ceballos "report[ed] a conversation [he] had had with the Deputy Sheriff, in which Ceballos told the Deputy that statements in his affidavit appeared to be 'grossly inaccurate.'" *Id.* (citation omitted). Ceballos's March 2 disposition memorandum, "if not both memoranda," *id.*, "were faxed to the Sheriff's Department." *Id.*

On March 9, 2000, there was a meeting "attended by several representatives from the Sheriff's Department, Sundstedt, Najera, Ceballos, and the Deputy District Attorney originally assigned to the *Cuskey* case." *Id.* Everyone present had a copy of Ceballos's March 2 disposition memorandum. *See id.* This memorandum, which had been "revised" to make it "less accusatory," *id.*, contained Ceballos's "conclusions that the Deputy Sheriff's characterizations of the crime scene in his affidavit were 'grossly inaccurate,' 'clearly misleading,' omitted key facts, and 'quite possibly, were wholly fabricated.'" *Id.* (citation omitted).

During the meeting "representatives from the Sheriff's Department verbally attacked Ceballos, accused him of acting like a 'public defender,' and demanded that he be removed from the case." *Id.* "The captain in the Sheriff's Department also wanted the case to go forward because he was fearful that one of the defendants would file a lawsuit against the Department." *Id.* at 4-5.

At the time of the March 9 meeting, the defense motion to traverse was shortly to be heard in the trial court. *See* Pet. App. 54a-55a (dist. ct. op.). "Following the meeting with the

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[5] Ceballos's revised March 2, 2000, memorandum is reproduced at J.A. 495-502.

Sheriff's Department, Sundstedt decided to proceed with the case pending the outcome" of the motion to traverse. Opp. 5. Ceballos then "informed defense counsel that he believed the affidavit contained false statements, and the defense subpoenaed him to testify at the hearing on their motion." *Id.*

Ceballos also "told [respondent] Carol Najera, his supervisor, that pursuant to *Brady v. Maryland*, he was required to turn over to the defense" his March 2 disposition memorandum and his March 6 memorandum to Sundstedt, the two memos "he had written expressing his opinion regarding the illegality of the search warrant." *Id.* Najera "instructed him to write a new memorandum that contained only the statements of the Deputy Sheriff who had prepared the affidavit and to omit all other information." *Id.* Ceballos also alleged that Najera "made a veiled threat of retaliation if Ceballos testified candidly" at the hearing. *Id.*

In response to Najera's express instruction, "Ceballos refused to write a new memorandum." *Id.* He indicated his willingness, however, "to provide copies" of the memos "to the defense with work product redacted." *Id.*

Less than two weeks later, on March 20, the hearing on the defense motion to traverse was held. *See* J.A. 198-363. Prior to the hearing, the trial court read all the documents relevant to the motion, including "the search warrant and affidavit and attachments." *Id.* at 203. At the hearing defense counsel reiterated that the purpose of the motion was:

> to hear the evidence regarding whether the issues and material involved in the affidavit were true, in fact, or misstatement [sic] or omissions. I'm asking that [Sheriff's] Deputies be called to testify, to bring in evidence that, in fact, material in the affidavit was not correct, was, in fact, false, and there was [sic] some material omissions.

J.A. 203. The defense called as witnesses the two Deputy Sheriffs who conducted the investigation at the crime scene,

the Deputy Sheriff who prepared the affidavit that supported the search warrant application, and Ceballos. *See* J.A. 199.

Ceballos testified about the conversations he had with the Deputy Sheriff who prepared the affidavit, *see id.* at 296-307, and further testified that he had not had any conversations with the two officers who investigated the crime scene. *Id.* at 307. The Prosecution, represented by petitioner Najera, did not object to Ceballos's testimony about the statements made to him by the officer who prepared the affidavit, *see id.* at 296-97, but did object to any testimony by Ceballos that was not "based upon a statement made by the officer." *Id.* at 298, 300. This objection was sustained by the trial court. *See id.* at 300. The trial court also sustained the Prosecution's objections to Ceballos's testimony about his "impressions" of the crime scene based on his visit to it "a few days" before the hearing and seven months after the search was executed. *Id.*[6]

At the conclusion of the hearing, the trial court denied the motion. J.A. 352. In support of its ruling, the trial court analyzed a variety of evidence offered in support of the search warrant. *See id.* at 348-52. The court found no basis in any of the testimony to conclude that any officer involved in the *Cuskey* search had committed perjury. *See id.* The court held that given the evidence presented to the magistrate

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[6] The police investigation of the crime scene that was the basis for the search warrant affidavit was conducted on August 3, 1999. *See* J.A. 213-14. The trial court sustained the Prosecution's objection to Ceballos's testimony as to (in the words of defense counsel) "the condition of the roadway and whether or not, *in his opinion*, tracks could be—I know he's no expert, but he can testify as to the condition of the roadway." *Id.* at 286 (emphasis added). In regard to Ceballos's proposed testimony about the crime scene, the trial court observed, "But how does Deputy D.A. Ceballos' testimony assist the court . . . if he made observations a few days ago and this affidavit was based on observations in August of '99?" J.A. 288.

who issued the search warrant, "I don't see what other conclusion a magistrate would come to." *Id.* at 351. The court further ruled that even if the magistrate had disregarded all of the statements in the affidavit whose truthfulness Ceballos disputed, the magistrate still had an adequate evidentiary basis to issue the search warrant. *See id.* 351-52. Subsequently one defendant was convicted at trial and one pled guilty to criminal charges.[7]

SUMMARY OF ARGUMENT

Ceballos's First Amendment right, as a government employee, to speak "as a citizen . . . upon matters of public concern," *Connick v. Myers*, 461 U.S. 138, 140 (1983), was not violated for two reasons.

First, when Ceballos provided his March 2 disposition memorandum and March 6 memorandum to defense counsel and testified at the hearing on defendant's motion to traverse, he was not speaking "as a citizen." Rather, Ceballos was speaking as a member of a prosecution team pursuant to the Due Process obligation of the District Attorney's office to disclose potentially exculpatory evidence to the defense. *See Brady v. Maryland*, 373 U.S. 83 (1963).

Although Ceballos was mistaken about the scope of the disclosure obligation created by *Brady*, he admitted to his immediate supervisor, petitioner Najera, that it was only "pursuant to *Brady v. Maryland*, [that] he was required to turn over to the defense the two memoranda he had written expressing his opinion regarding the illegality of the search warrant." Opp. 5. As the district court correctly noted, Ceballos prepared his March 2 disposition memorandum "as

[7] The opinion of the district court states that two of the three *Cuskey* defendants pled guilty but this includes one defendant who pled guilty and served a sentence prior to the hearing on the motion to traverse. *See* J.A. 200-01, 361-62 (discussing presence at hearing of defendant Ojala).

part of his job," Pet. App. 65a n.5, a characterization equally true of his March 6 memorandum regarding the discussions he had had with the Deputy Sheriff who prepared the affidavit, and his testimony at the hearing on the motion to traverse. Because all of Ceballos's speech in this case was engaged in strictly pursuant to what he and his supervisors believed to be the Due Process obligations of the District Attorney's office, he was not speaking "as a citizen" and his First Amendment rights were not implicated.

Second, even if the Court concludes that Ceballos has satisfied the first part of the two-step analysis of *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *id.* at 568, clearly outweighs Ceballos's "interests . . . as a citizen in commenting upon matters of public concern." *Id.*

The undisputed facts demonstrate that Ceballos's concern that a perjured affidavit provided the basis for the search warrant was treated with the utmost seriousness by his supervisors from the moment he raised the matter. *See* Opp. 4 ("Sundstedt treated [Ceballos's March 2 disposition memorandum] as exceptional, as if Ceballos's accusations raised a 'novel issue.'"); *see also id.* at 5 (Najera instructed Ceballos to write an evidentiary memorandum for submission to the defense containing "the statements of the Deputy Sheriff who had prepared the affidavit" that Ceballos had collected during his investigation).

The manner in which Ceballos's supervisors, petitioners Sundstedt and Najera, directed him were in full accord with the Due Process obligations of the District Attorney's office to disclose exculpatory evidence. *Brady* is limited to evidence as opposed to a prosecutor's opinions or assessment of evidence, and the *Brady* doctrine requires the disclosure only of such evidence as is unavailable to the defense "by the exercise of reasonable diligence." *United States v. White*, 970

F.2d 328, 337 (7th Cir. 1992). It thus does not apply to any of Ceballos's observations of, or conclusions about, the crime scene searched by the officers in *Cuskey*.

Ceballos also unilaterally sought to compromise the protections provided to prosecutors' "impressions, conclusions, [and] opinions" by California's work product doctrine. *See* Cal. Penal Code § 1054.6 (incorporating by reference Cal. Civ. Proc. Code § 2018(c)). Ceballos's attempt to disregard petitioner Najera's legally correct instructions not to disclose the DA office's work product constituted insubordination that fully warranted disciplinary measures.

The interest of the District Attorney's office "in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. at 568, clearly outweighed Ceballos's desire to inform the defense, without his supervisors' authorization, of "his opinion regarding the illegality of the search warrant." Opp. 5. Indeed, Ceballos had no legitimate interest in disclosing to defense counsel his opinions or conclusions, thereby compromising the DA's work product privilege. As the Court held in *Connick*, "discipline and morale in the workplace are related to an agency's efficient performance of its duties." 461 U.S. at 148.

In *Connick* the Court did "not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id.* at 152. The decisions made and instructions given to Ceballos by his two supervisors, petitioners Sundstedt and Najera, were in full conformity with federal law that mandates the disclosure of exculpatory evidence, and state law that protects attorney work product from disclosure. These laws governed not only Ceballos's actions as a Deputy DA but the work of the office as a whole.

Because of the necessarily close working relationship between the DA's office and law enforcement officers, the instructions given to Ceballos were also essential to "promot[e] the efficiency of the public services [the DA's office] performs through its employees." *Pickering*, 391 U.S. at 568. So, too, were the personnel decisions allegedly taken with respect to Ceballos, *see* Opp. 5, that he claims were "retaliatory" but fell well short of termination. *See id.* The judgment of the court of appeals should accordingly be reversed.

ARGUMENT

I. CEBALLOS'S SPEECH ABOUT THE *CUSKEY* CASE WAS NOT PROTECTED BY THE FIRST AMENDMENT BECAUSE HE WAS SPEAKING AS A MEMBER OF A PROSECUTION TEAM, NOT AS A CITIZEN

This Court's landmark decision in *Pickering* established that public employees do not surrender their First Amendment right to speak as citizens on matters of public concern merely because they have accepted public employment. The foundation for *Pickering* and later public employee speech cases is the Court's rejection of the view, articulated by Justice Holmes while on the Supreme Judicial Court of Massachusetts, that "[A] policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892), *quoted in Connick v. Myers*, 461 U.S. 138, 143-44 (1983). Until the early 1950's "Holmes' epigram expressed this Court's law." *Id.* at 144 (collecting cases). Since *Pickering*, however, the Court's "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Id.* at 147.

The public employee speech doctrine evolved in the 1950's and 1960's in a series of cases in which the Court held it impermissible "to require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated." *Id.* at 144. These cases struck down oaths denying past affiliation with the Communist Party, denials of employment based on "previous membership in a particular party," and statutes that barred employment based on membership in allegedly "'subversive' organizations." *See id.* (collecting cases). As *Connick* explained,

> In all of these cases, the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" by the fear of discharge from joining political parties and other associations that certain public officials might find "subversive."

Id. at 144-45.

"At the same time," the *Pickering* Court recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U.S. at 568. The issue in each case, the Court held, "is to arrive at a balance between the interests of the [employee], *as a citizen*, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (emphasis added).

As *Connick* makes clear, "[t]he repeated emphasis in *Pickering* on the right of a public employee, 'as a citizen, in commenting upon matters of public concern,' was not accidental." 461 U.S. at 143. This point, reaffirmed in later cases, "reflects both the historical evolvement of the rights of

public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* (footnote omitted).

The principles on which *Pickering* is grounded are illustrated by the facts of that case. Pickering was a teacher in Will County, Illinois. He was fired by the Board of Education "for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools." 391 U.S. at 564. Pickering's letter to the newspaper was written and published during a protracted public debate over the appropriate level and method of financing schools in the district that was triggered by a series of ballot issues.

Pickering's letter followed the publication in the same newspaper of a letter by the superintendent of schools that warned of the adverse consequences of inadequate funding. *See id.* at 566. The superintendent's letter "was published in the paper two days before the election [on a sizeable school bond issue] and submitted to the voters in mimeographed form the following day." *Id.* It followed the publication in the same newspaper of "a variety of articles attributed to the District 205 Teachers' Organization" likewise urging passage of the bond issue. *Id.*

It was in this context that Pickering wrote his letter to the newspaper criticizing the School Board's management of school finances, and for which he was terminated. The fact that Pickering's speech was made "as a citizen" is manifest from the text of his letter, which is an appendix to the Court's opinion. *See id.* 575-78. In the concluding paragraph, for example, Pickering wrote, "I must sign this letter *as a citizen*, taxpayer and voter, *not as a teacher*." *Id.* at 578 (emphasis added).

The Court held that Pickering's First Amendment right to speak "as a citizen" on a matter of public concern had been violated by his termination for publishing a letter unrelated to his duties as a teacher. *See id.* at 574-75. It nonetheless took pains to emphasize several important facts that are readily distinguishable from this case.

First, the statements for which Pickering was terminated were "in no way directed towards any person with whom [he] would normally be in contact in the course of his daily work as a teacher." *Id.* at 569-70. "Thus," the Court noted, "*no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here.*" *Id.* at 570 (emphasis added). Equally important, in *Pickering* and altogether unlike this case, Pickering's "employment relationships with the Board [of Education] and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.*

In short, the speech for which Pickering was terminated was classic political speech that was an integral part of an ongoing public debate about a school financing ballot issue. It was therefore paradigmatic speech engaged in "as a citizen." It was also clear that Pickering's termination was the direct result of his publication of a letter to the editor on this issue.

In this case, by contrast, all of Ceballos's speech about the *Cuskey* case was engaged in as one member of a team of government prosecutors and as a representative of the DA's office, not as a citizen. For example, by his own account of the facts, he "told Carol Najera, his supervisor, that pursuant to *Brady v. Maryland*, he was required to turn over to the defense" his March 2 case disposition memorandum. Opp. 5. As the federal district court found based on Ceballos's admissions, disposition memoranda were "common" in the

DA's office, Pet. App. 64a, and the March 2 memo "was prepared as part of [Ceballos's] job." *Id.* at 64a-65a n.5. Ceballos told Najera that *Brady* likewise required him to produce to the defense his March 6 memorandum to Sundstedt. *See* Opp. 5.[8]

Similarly, as part of his investigation of defense counsel's allegation that the Deputy Sheriff's affidavit contained perjured testimony, Ceballos visited the crime scene seven months after the execution of the search. *See* J.A. 300-01; Opp. 3. Ceballos's observations of the crime scene were not subject to disclosure under *Brady*, however, because prosecutors are not required to disclose evidence to which "the defendant has access . . . by the exercise of reasonable diligence." *United States v. White*, 970 F.2d 328, 337 (7th Cir. 1992) (citing *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980)). All of Ceballos's observations of the crime scene were equally available to defense counsel or their investigators "by the exercise of reasonable diligence." *Id.*

In addition, Ceballos interviewed the affiant Deputy Sheriff about the contents of his affidavit. *See* J.A. 296-300. He also "review[ed] the evidence," "discuss[ed] the matter with colleagues in his office," and met "with his direct supervisor, Carol Najera, and her superior, Head Deputy District Attorney Frank Sundstedt." Opp. 3.

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[8] As discussed below at pp. 20-23, Ceballos was mistaken in his view that the *Brady* doctrine required him to divulge to the defense "his opinion regarding the illegality of the search warrant." Opp. 5. While *Brady* and its progeny require the disclosure of exculpatory evidence not available to the defense, the Court has never held that a prosecutor is required to turn over anything other than evidence. "[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 675 (1985) (footnote omitted). *See also United States v. Nobles*, 422 U.S. 225, 231, 236-38 & n.12 (1975).

Ceballos's investigation of the veracity of the Deputy Sheriff's affidavit—an investigation triggered by a request from defense counsel, *see id.*—was important, but it was an integral part of the work of a lawyer in a prosecutor's office. This is equally true of Ceballos's two memoranda to Head Deputy District Attorney Sundstedt based on his investigation. *See* Pet. App. 64a (dist. ct. op.) (Ceballos "admits that it was 'pursuant to his duties as a prosecutor . . . [that] he wrote the [March 2] memo expressing his concerns about the veracity of the officers in this case.'") (quoting Plaintiff's Statement of Genuine Issues ¶ 4). Likewise, Ceballos's testimony at the March 20 hearing on the motion to traverse was an obligation of the DA's office to the extent it concerned potentially exculpatory evidence whose disclosure was required by the *Brady* doctrine, *see* J.A. 295, but exceeded the bounds of *Brady* insofar as Ceballos wished to testify about his own observations, opinions, and interpretation of evidence. *See, e.g.*, J.A. 57 (Ceballos dep.).

In contrast to Pickering's speech "as a citizen," Ceballos engaged in all of the speech for which he now claims First Amendment protection in his capacity as a Deputy District Attorney and as a member of a team of prosecuting attorneys and representative of the DA's office. Likewise, to the extent that there was a *Brady* obligation to produce potentially exculpatory *evidence* to the defense—an obligation that Ceballos admits that his immediate supervisor, petitioner Najera, instructed him to carry out, *see* Opp. 5—this was an obligation of the DA's office. If, for example, Ceballos had been incapacitated and unable to provide *Brady* evidence in the office's files to the defense, that would not have obviated the Due Process obligation of the District Attorney's office to produce such evidence. *See Martinez v. Wainwright*, 621 F.2d 184, 186 (5th Cir. 1980) (under *Brady*, "the duty to produce requested evidence falls on the State").

Because all of the speech for which Ceballos now claims First Amendment protection was engaged in solely in his capacity as one member of a prosecution team and pursuant to what Ceballos understood, rightly or wrongly, to be the Due Process obligations of that office, the speech was not protected by the *Pickering/Connick* line of employee speech cases. The judgment of the court of appeals according First Amendment protection to Ceballos's speech should therefore be reversed.

II. THE GOVERNMENT'S INTEREST IN PROMOTING THE EFFICIENCY OF THE WORK OF THE DISTRICT ATTORNEY'S OFFICE OUTWEIGHED CEBALLOS'S INTEREST IN DISCLOSING TO DEFENSE COUNSEL HIS CONCLUSIONS AND OPINIONS ABOUT PROSECUTION EVIDENCE

Even if the Court concludes that Ceballos has satisfied the first part of the two-step analysis of *Connick* and *Pickering*, under the balancing of interests that then follows "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. at 568, outweighs Ceballos's "interests . . . as a citizen, in commenting upon matters of public concern." *Id.*

In balancing an employee's First Amendment-protected interests in speech against the employer's needs to carry out its public mission, the Court has repeatedly recognized "the practical realities of government employment, and the many situations in which . . . most observers would agree that the government must be able to restrict its employees' speech." *Waters v. Churchill*, 511 U.S. 661, 672 (1994) (plurality opinion). The Court has "given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern." *Id.* at 673.

In determining whether the employer's interests in efficient and effective operation of a government agency outweigh the employee's interest in speech, the Court has recognized "pertinent considerations" to include

> whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.
>
> These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest.

Rankin v. McPherson, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570-73).

Even when viewed in the light most favorable to Ceballos, the record demonstrates that his belief that a perjured affidavit had been used to obtain the search warrant in *Cuskey* was treated with utmost gravity by his supervisors from the outset. Ceballos concedes that the head of the office, petitioner Sundstedt, regarded Ceballos's March 2 disposition memorandum "as exceptional, as if Ceballos's accusations raised a 'novel issue.'" Opp. 4.

On March 6, Ceballos submitted a second memorandum to Sundstedt in which he reported that he had "told the Deputy [Sheriff who prepared the affidavit] that statements in his affidavit appeared to be 'grossly inaccurate.'" *Id.* (citation omitted). Then, by Ceballos's own account, "[t]he March 2 memorandum, if not both memoranda, were faxed to the Sheriff's Department." *Id.* (citation omitted). As noted

above, Ceballos's March 2 memorandum contained his highly opinionated beliefs that the Deputy Sheriff's characterizations of the crime scene were 'grossly inaccurate,' 'clearly misleading,' omitted key facts, and 'quite possibly were wholly fabricated.'" *Id.* (citation omitted).

Three days after Ceballos submitted his second memorandum, Ceballos acknowledges that "a meeting was held . . . [that was] attended by several representatives from the Sheriff's Department, Sundstedt, Najera, Ceballos, and the Deputy District Attorney originally assigned to the *Cuskey* case." *Id.* (citing Pet. App. 3a). In view of the fact that defense counsel had already filed a motion to traverse that was shortly to be decided in the state trial court, Sundstedt, who did not agree with Ceballos's conclusion, "decided to proceed with the case pending the outcome of a defense motion challenging the basis for the search warrant." *Id.* at 5 (citing Pet. App. 3a-4a). *See also* J.A. 116-18 (Sundstedt dep.); *id.* at 117 ("After the meeting occurred, I was not convinced like Richard was convinced.").

Thereafter, notwithstanding Sundstedt's decision as head of the office to allow the court to determine the validity of the warrant and the underlying affidavit, "Ceballos informed defense counsel that *he believed* the affidavit contained false statements." *Id.* (emphasis added). Naturally enough, "the defense subpoenaed [Ceballos] to testify at the hearing on their motion" to traverse. *Id.* (citing Pet. App. 4a).

Ceballos also sought to compromise the protections provided to prosecutors' "impressions, conclusions, [and] opinions" by California's work product doctrine. *See* Cal. Penal Code § 1054.6 (incorporating by reference Cal. Civ. Proc. Code § 2018(c)); *see also Roland v. Superior Court*, 124 Cal. App. 4th 154, 169 (3d Dist. 2004) ("'To the extent that a report of a witness interview reflects an attorney's mental processes, it is exempted from discovery by section 1054.6.'") (quoting *Hobbs v. Municipal Court*, 233 Cal. App.

3d [illegible] (4th Dist. 1991), *overruled on other grounds, People v. Hillis*, 18 Cal. 4th 285 (1998)).[9] Ceballos was thus mistaken when he "told Carol Najera, his supervisor, that pursuant to *Brady v. Maryland*, he was required to turn over to the defense the two memoranda he had written [to Sundstedt] expressing *his opinion regarding the illegality of the search warrant*." Opp. 5 (emphasis added).

In response, petitioner Najera acted to preserve the DA office's work product protections in the face of Ceballos's unilateral and unauthorized efforts to waive them. She "instructed him to write a new memorandum that contained only the statements of the Deputy Sheriff and to omit all other information." But Ceballos point blank "refused" (*id.*) to follow Najera's unambiguous and legally correct instruction.[10]

[9] These provisions of California law, expressly applicable to prosecutors, provide: "Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." Cal. Civ. Proc. Code § 2018(c) (incorporated by reference in Cal. Penal Code § 1054.6). These statutes were in force throughout the period covered by this case and remain in effect until July 1, 2005, when they will be replaced by substantially identical work product protections.

Unlike the *Brady* doctrine, the work product doctrine is not grounded in the federal Constitution. In California it is based on common law (including this Court's decision in *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947), as well as state case law), Proposition 115 (adopted by the people of California in 1990 and part of the state Constitution), and subsequently enacted statutes. The history of the California work product doctrine in criminal cases is set forth in *Hobbs*. *See* 233 Cal. App. 3d at 690-95 (collecting cases and other authorities).

[10] *See Roland*, 124 Cal. App. 4th at 169 ("statements or reports that merely reflect what an intended witness said during an interview are not work product"); *see also* Cal. Penal Code § 1054.1(f) (mandating disclosure by prosecution of "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial").

Rather than following the instructions of his supervisor, Ceballos told her that he was willing to "provide copies of his memoranda to the defense with work product redacted." *Id.*[11] *See* J.A. 54-58 (Ceballos dep.) As Ceballos readily testified in his deposition, "I finally told her, 'Carol, you have your opinion; I have mine. *But you need to know that if I'm asked my opinion when I'm up on the stand about what I believe happened in this case, I will state that I believe these deputies lied on this warrant.*" *Id.* at 57 (emphasis added).

Ceballos's refusal to follow his supervisor's instruction on a matter central to the office's strategy in a criminal prosecution was insubordination, pure and simple. It is all the more disturbing since Najera's instruction to him was correct as a matter of law. Moreover, the protections provided to prosecutors' work product by California law belong to the DA's *office*, not to a single attorney such as Ceballos, who was only one member of a prosecution team working on the *Cuskey* case. Ceballos was thus not only insubordinate but was acting beyond his authority when he attempted to disclose the DA office's work product contrary to the direct instructions of his supervisor.

While the prosecution's *Brady* obligation to disclose exculpatory evidence arises from a constitutional imperative, *see* 373 U.S. at 86-87; *see also* Cal. Penal Code § 1054.1(e) (mandating disclosure by prosecution of "[a]ny exculpatory evidence"), the policies that underlie the work product

[11] *Amici* respectfully submit that beyond Ceballos's insubordination in disputing his supervisor's clear instruction, there is a qualitative difference between a memorandum written in order to comply with the *Brady* obligations of the DA's office, which Najera instructed Ceballos to prepare, and "redacted" versions of the internal case disposition memos that Ceballos had earlier written to the office head. In any event, the decision as to the manner in which the DA's office should comply with its *Brady* obligations rested with Ceballos's supervisors, not with Ceballos.

doctrine are also compelling. As this Court explained in the landmark case of *Hickman v. Taylor*,

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that [the lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, *memoranda*, correspondence, briefs, *mental impressions*, *personal beliefs*, and countless other tangible and intangible ways—aptly though roughly termed . . . the "Work product of the lawyer."

329 U.S. 495, 510-11 (1947) (internal citation omitted) (emphasis added).

Equally important, the *Hickman* Court emphasized the corrosive consequences were attorney work product not protected from discovery. "[M]uch of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial." *Id.* at 511.[12]

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[12] It is unclear whether Ceballos's openly expressed views on the veracity of the *Cuskey* affidavit inadvertently gave rise to the sort of "sharp practices" on the part of opposing counsel that the Court foresaw in *Hickman*. It is, of course, customary for both prosecution and defense to employ their own investigators to assist in factual development of cases for trial. *See, e.g., United States v. Nobles*, 422 U.S. at 227 ("an investigator for the defense" was employed by counsel to "interview. . . witnesses and preserve[] the essence of those conversations in a written report"); *Roland*, 124 Cal. App. 4th at 155 (issue in case was whether applicable California discovery rule "covers a defense investigator's 'raw written notes' of a witness's statements") (citation omitted).

Amici in no way question Ceballos's good faith in acting upon what he perceived to be his obligation to disclose exculpatory evidence to the defense. Ceballos had no obligation under *Brady*, however, to report to the defense his observations of a freely accessible crime scene. In this connection it is noteworthy that Ceballos was the only supporting witness called by the defense at the hearing on the motion, the three other witnesses being the two officers who initially investigated the crime scene and the officer who prepared the disputed affidavit. *See generally* J.A. 199, 207 *et seq.*

While *Hickman* was a civil case, the work product doctrine is fully applicable in criminal cases. Indeed, as this Court emphasized in *Nobles*, "[a]lthough the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." 422 U.S. at 238. In criminal as in civil cases, the work product doctrine is essential because "[a]t its core, [it] shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Id.*

The centrality of the work product doctrine to the efficient and effective operation of a large District Attorney's office such as the Pomona branch of the Los Angeles County DA's office is illustrated by the facts of this case. The prosecution of the *Cuskey* case was a team effort and Ceballos was just one member of that team. At the time Ceballos was contacted by defense counsel about the disputed affidavit, the case was being prosecuted by the Deputy District Attorney "originally assigned to the . . . case," Opp. 4, who was working "under Ceballos's supervision." *Id.* at 3. Ceballos, in turn, had

his own "direct supervisor," petitioner Najera, *id.*, and responsibility for all cases in the office rested with petitioner Sundstedt, the Head Deputy District Attorney for the Pomona branch office. *Id.* Each of these attorneys, as well as the law enforcement officers in the Sheriff's Department with whom they worked, were involved in the prosecution of the *Cuskey* case.

After Ceballos had been asked by defense counsel to investigate the veracity of the affidavit, Ceballos, by his own account, "review[ed] the evidence, visit[ed] the crime scene, . . . *discuss[ed] the matter with colleagues in his office*" and met "with his direct supervisor, Carol Najera, and her superior, Frank Sundstedt." *Id.* (emphasis added). Ceballos admits that his head supervisor, Sundstedt, immediately took steps to pursue the matter. *Id.*

Ceballos thereafter prepared his March 2 disposition memorandum to Sundstedt, in which he "discuss[ed] his assessment" of the affidavit's veracity and "*recommended* that the case be dismissed." *Id.* at 3-4 (emphasis added). As the federal district court noted, Ceballos "obviously recognized that he needed Sundstedt's permission" to dismiss the case, Pet. App. 64a n.5, *i.e.*, that it was not a decision that he was empowered to make but rather a decision that rested with the head attorney in the Pomona office, petitioner Sundstedt.

Following a subsequent meeting "attended by several representatives from the Sheriff's Department, Sundstedt, Najera, Ceballos, and the Deputy District Attorney originally assigned to the. . . case," Opp. 4, Sundstedt decided not to follow Ceballos's recommendation to dismiss the case but instead "to proceed with the case pending the outcome of" the motion to traverse. *Id.* at 5. Notwithstanding Sundstedt's decision to let the trial court determine the validity of the warrant and the underlying affidavit—a decision that Ceballos fully understood was Sundstedt's to make, *see id.* at

3-4—Ceballos thereafter "informed defense counsel that *he believed the affidavit contained false statements*, and the defense subpoenaed him to testify at the hearing on their motion." *Id.* at 5. (emphasis added). After the defense motion to traverse the warrant was denied, one defendant was convicted at trial and one pled guilty. *See* Pet. App. 55a (opinion of district court).[13]

Amici do not doubt that Ceballos was utterly convinced that he was correct about the untruthfulness of the affidavit. Nevertheless, a team effort was involved in every aspect of the *Cuskey* prosecution and Ceballos repeatedly refused to defer to the decisions and instructions of his supervisors, who had ultimate responsibility for handling the *Cuskey* prosecution. By his own account Ceballos also "refused" to follow the legally correct instruction of his immediate supervisor, petitioner Najera, that he "write a new memorandum" for disclosure to the defense pursuant to *Brady* "that contained only the statements of the Deputy Sheriff who had prepared the affidavit and to omit all other information" contained in his highly "accusatory" memos to Sundstedt. *See* Opp. 4-5. He also states that he "minced no words" in his March 2 disposition memorandum, *id.* at 4, in which he "accused the Deputy Sheriff of having committed perjury." *Id.*

In deciding whether a public employee's right to speak on a matter of public concern has been violated by allegedly retaliatory personnel action, the Court must conclude that the employee's interests in speech outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. As this Court held in *Connick*, which also involved an Assistant District Attorney who claimed that

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[13] *See* p. 8 n.7, *supra* (a third defendant pled guilty prior to the motion to traverse).

she had been retaliated against for the exercise of First Amendment rights.

> The District Court was . . . correct to recognize that 'it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close relationships with their superiors.'. . . . When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.

461 U.S. at 151-52 (internal citation and footnote omitted). "Furthermore," the Court added in language directly applicable here, "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id.* at 152.

On one hand, Ceballos had no legitimate interest in communicating protected work product to defense counsel. The work product doctrine privilege belongs to the DA's office, *see* Cal. Penal Code § 1054.6, and Ceballos was not authorized to waive it.

On the other side of the balance, this Court has repeatedly recognized the importance in public employee speech cases of such factors as "whether the [speech] impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the [public employer's] enterprise." *Rankin*, 483 U.S. at 388 (citation omitted). This is especially true of a district attorney's office, in which actions such as Ceballos's can undermine the office's public credibility and its ability effectively to prosecute criminal cases.

Even when the facts are viewed in the light most favorable to Ceballos, it is clear that he "interfered with the efficient

functioning of the office," *id.* at 389, "disturbed or interrupted other employees," *id.*, and "discredited the office by making [his] statement[s]" both "in public," *id.*, *i.e.*, at the hearing on the motion to traverse, and by his unilateral communication to defense counsel about the veracity of the affidavit following Sundstedt's decision on March 9 not to dismiss the *Cuskey* prosecution pending resolution of the motion. *See* Opp. 5.[14]

In the words of the *Waters* plurality, "[g]overnment agencies are charged by law with doing particular tasks" and "[a]gencies hire employees to help do those tasks as effectively and efficiently as possible." 511 U.S. at 674-75. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Id.* at 675. While the district court gave appropriate weight to these compelling state interests, the court of appeals erred in both its analysis of the facts and its interpretation of the law.

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[14] In *Connick* the Court ruled that the summary termination of an Assistant District Attorney did not violate the First Amendment. In this case, the personnel actions taken subsequent to Ceballos's actions disregarding the decisions and instructions of his supervisors were far milder. Indeed, while *amici* agree that these personnel actions were serious—as alleged by Ceballos, they included demotion from calendar deputy to trial deputy; a choice of remaining at the Pomona branch office and prosecuting misdemeanors or transferring to the El Monte branch if he wished to continue to handle felonies; and reassignment of his murder case, *see* Pet. App. 4a-5a—they were not "retaliatory." Under the facts as alleged by Ceballos, his conduct required firm responsive action by the District Attorney's office to maintain discipline and "'the efficiency of the public services it performs through its employees.'" *Connick*, 461 U.S. at 140 (quoting *Pickering*, 391 U.S. at 368).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 309
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the
Amici Curiae

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IN THE

SUPREME COURT OF THE UNITED STATES

GIL GARCETTI, ET AL.
Petitioners,

v.

RICHARD CEBALLOS
Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, AND THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

In support of the Respondent

J. Joshua Wheeler
Counsel of Record
Robert M. O'Neil
The Thomas Jefferson Center for
the Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
434-295-4784

July 21, 2005

Donna R. Euben
American Association of
University Professors
1012 Fourteenth Street, N.W.
Suite 500
Washington, DC 20005
202-737-5900

Of Counsel:
David M. Rabban
University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705-1012
512-232-1308

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This brief is filed with the written consent of all the parties.

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STATEMENT OF INTEREST OF AMICI CURIAE

The American Association of University Professors and the Thomas Jefferson Center for Protection of Free Expression believe that a blanket prohibition categorizing all job-related speech as unprotected by the First Amendment could seriously undermine the Court's traditional treatment of academic freedom as a "special concern of the First Amendment" and impair the academic freedom of professors in the pursuit of truth and knowledge.

The American Association of University Professors (AAUP) is an organization of approximately 45,000 faculty members and research scholars in all academic disciplines. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work.

AAUP has frequently participated before this Court in cases raising First Amendment issues in higher education. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271 (1984). The AAUP

has also filed amicus briefs in cases before this Court that involve the First Amendment rights of public employees generally that have the potential to affect academic speech, as in this case. *See, e.g., Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979). This Court has cited AAUP policies in its decisions. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971); *Board of Regents v. Roth*, 408 U.S. 564, 579 n. 17 (1972).

The Association's *1915 Declaration of Principles*, issued by the AAUP in its founding year, is the major statement on academic freedom in America. AAUP, "General Report of the Committee on Academic Freedom and Tenure (1915)," *AAUP Policy Documents & Reports* 291 (9th ed., 2001) ("1915 Declaration"). The 1915 Declaration was issued in response to the widespread dismissal of faculty members by administrators and boards of trustees who disagreed with the expression of professors, including professors teaching Darwinism; promulgating views favorable "toward free trade and greenbacks;" and speaking out for free silver. Walter P. Metzger, *Academic Freedom in the Age of the University*, 145-47 (1955).

The 1915 Declaration provides for "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action." 1915 Declaration, *supra*, at 292. It eloquently states:

> The responsibility of the university teacher is primarily to the public itself, and the judgment of his own profession.... So far as the university teacher's independence of thought and utterance is concerned--though not in other regards--the relationship of professors to trustees may be compared to that between judges of the federal courts and the executive who appoints them. University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are judges subject to the control of the president, with respect to their decisions; while of course, for the same reason, trustees are no more to be held responsible for, or to be presumed to agree with, the opinions or utterances of professors, than the president can be assumed to approve of all the legal reasoning of the courts.

Id. at 295.

The joint *1940 Statement of Principles on Academic Freedom and Tenure*, which was authored by the AAUP and the Association of American Colleges (now the Association of American Colleges and Universities), codified the 1915

Declaration and has been endorsed by over 190 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, *AAUP Policy Documents & Reports* 3 (9th ed., 2001) ("1940 Statement"). The 1940 Statement provides: "Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning." *Id.*

This Court's justification for its holding that academic freedom is a "special concern of the First Amendment," *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), in many ways parallels the rationale underlying the 1915 Declaration and reiterated in the 1940 Statement: the advancement of truth, the need for scholarly independence, and the university as a "market place of ideas." *Keyishian*, 385 U.S. at 603.[1]

[1] "Both the Supreme Court and the 1915 Declaration maintained that the search for truth, in universities as well as in society generally, is never complete and requires free debate about competing ideas that precludes any imposition of ideological orthodoxy." David M. Rabban, "'Individual'

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization devoted solely to the protection of free speech and free press. Since its opening in 1990, the Center has pursued its mission in various forms, including the filing of amicus briefs in both state and federal courts. The Center has filed briefs in several cases involving the First Amendment rights of public employees and of Internet users. A number of its cases also involved questions of academic freedom and free speech within the academic community.

& 'Institutional' Academic Freedom," 53 Law & Contemp. Probs. 227, 240-41 (1990) (also noting that the judicial opinions and "the 1915 Declaration...used similar metaphors"; for example, "[t]he description of the university in the 1915 Declaration as an 'intellectual experiment station' closely resembles the description of the classroom in *Keyishian* as a 'marketplace of ideas.'").

SUMMARY OF ARGUMENT

For two closely related reasons, Amici urge affirmance of the judgment of the Court of Appeals. Since the late 1960s, this Court has consistently conferred First Amendment protection on the speech of public employees that deals with matters of public concern, recognizing the vital role that such speech plays in the democratic process. This protection has never excluded, nor treated less favorably, expression of public employees that relates to the speaker's position or assigned responsibilities. Thus, any suggestion that such statements forfeit First Amendment protection because they are job-related, or are made within the speaker's scope of employment, would be seriously at variance with the central premises of this Court's decisions. Such a view would also depart radically from the unanimous consensus of the federal courts of appeals, all of which have been consistent with the judgment of the Ninth Circuit in this case.

Second, Amici are especially concerned that lessening First Amendment protection for job-related public employee speech would threaten academic freedom. Much potentially controversial

expression by university professors relates to the subject matter of the speaker's academic expertise, and could thus be deemed unprotected under a diminished and distorted concept of "public concern." Indeed, the most valuable contributions that most university scholars and teachers make to public debate and understanding typically derive from their academic disciplines or fields of expertise. Thus, any suggestion that "matters of public concern" may not encompass job-related expression of professors would undermine the special protections the Court has given academic freedom for the past 50 years. Adoption of such a view would also create a perverse irony: Constitutional protection for a professor's speech would now extend only to those public statements on which the speaker was *least well informed*, while denying such protection to statements reflecting the speaker's academic expertise (and thus his or her responsibilities as a public employee). Such a result seems not only unimaginable in practical terms, but totally at variance with everything this Court has said about academic freedom. Thus, while Amici fully share the general concerns about drastic diminution of First Amendment protection

for the speech of government workers, they bring to this Court a special concern about the potentially devastating effect of such a change for academic freedom.

ARGUMENT

I. FIRST AMENDMENT PROTECTION FOR PUBLIC EMPLOYEE SPEECH ON MATTERS OF PUBLIC CONCERN INCLUDES EXPRESSION WITHIN THE SCOPE OF THE SPEAKER'S EMPLOYMENT

The Court of Appeals correctly held that respondent's speech was fully protected by the First Amendment, addressing as it did a matter of public concern, no less because it occurred within the workplace and related to issues within respondent's assigned area of responsibility as a prosecutor. That view was entirely consistent with this Court's judgment in *Connick v. Myers*, 461 U.S. 138, 147 (1983), which set forth the criteria that have since been applied to distinguish between protected speech "as a citizen upon matters of public concern" and unprotected speech "as an employee upon matters only of personal interest." As all federal circuits have recognized when they have addressed this issue, many public employee statements deserve full First Amendment protection even though they may occur within the workplace and

may relate to the speaker's assigned responsibilities as a government worker. *See, e.g., Mansoor v. Trank*, 319 F.3d. 133, 138 (4th Cir. 2003) (stating "matters 'relating to your employment' clearly *can* encompass matters of public concern"). *See also Taylor v. Keith*, 338 F.3d. 639 (6th Cir. 2003); *Delgado v. Jones*, 282 F.3d. 511 (7th Cir. 2002); *Branton v. City of Dallas*, 272 F.3d. 730 (5th Cir. 2001); *Dill v. City of Edmond*, 155 F.3d 1193 (10th Cir. 1998); *Kariotis v. Glendening*, 229 F.3d 1142 (4th Cir. 2000); *Belk v. City of Elvon*, 228 F.3d. 872 (8th Cir. 2000); *Fikes v. City of Daphne*, 79 F.3d. 1079 (11th Cir. 1996).

This Court explained clearly in *Connick* why certain statements may not deserve such protection; the unprotected statements (more precisely, questions in a workplace survey) involved in that case were described as "mere extensions of [the speaker's] dispute over her transfer to another section" which "did not seek to inform the public" of potential wrongdoing within the agency and "would convey no information at all other than the fact that a single employee is upset with the status quo." 461 U.S. at 148. Finally, the Court noted that "[t]hese questions reflect one

employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre." *Id.* Appropriately, a government worker who simply wishes to press a personal grievance should pursue the "narrowly drawn grievance procedures" as the proper channel for such matters and not broadcast such concerns to the world at large. *Pickering v. Board of Education*, 391 U.S. 563, 572 n.4 (1968).

Connick's rationale for denying protection to such expressions of purely personal grievance can easily be reconciled with the Ninth Circuit's sound basis for treating the respondent's statements as protected "matters of public concern." *Ceballos v. Garcetti*, 361 F.3d 1168, 1180 (2003). None of the disqualifying characteristics of the *Connick* questions can be found in this case. Respondent's statements here related to general agency policy and not personal pique. They concerned the public interest in the fairness of law enforcement procedure and not a narrow dispute between a single assistant district attorney and his superior. Neither the limited dissemination of respondent's statements nor their relevance to the workplace served in any way to lessen their claim

for First Amendment protection under the *Pickering-Connick* doctrine. By any measure or standard, these were statements on "matters of public concern," and on that basis they were fully entitled to constitutional protection, as the court of appeals ruled. *Id.*

The implications of a contrary view are startling. At a practical level, drawing at any other place the line between protected and unprotected public employee speech would pose daunting tasks for the lower courts, which have found the present distinction eminently workable – as witness the unanimity among circuits on the very issue posed by the case. Even more serious than the practical problems posed by such a departure would be the serious potential diminution in First Amendment protection for a vital sector of expression, that of public employees on matters of public concern that may relate to their assigned responsibilities or may occur within the workplace. Thus, Amici strongly urge this Court to affirm the judgment of the court of appeals, recognizing once again that speech such as respondent's in this case does indeed deserve First Amendment protection.

II. ACADEMIC FREEDOM, AN INTEREST UPON WHICH THIS COURT HAS CONFERRED SPECIAL FIRST AMENDMENT PROTECTION, COULD BE IMPERILED BY A RECASTING OF THE "PUBLIC CONCERN" DOCTRINE

A. Decisions of this Court have consistently embraced academic freedom for university professors as a core First Amendment value.

This Court has unqualifiedly recognized for nearly half a century the special stature of academic freedom for individual faculty among protected First Amendment interests. From its initial recognition of academic freedom as a First Amendment liberty in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and continuing unabated through its recent decision in *Grutter v. Bolinger*, 539 U.S. 306 (2003), the Court has not wavered in identifying the university as "a traditional sphere of free expression so fundamental to the functioning of society" that First Amendment concerns apply with special force. *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). This Court has without exception affirmed the principles first advanced in the *Sweezy* case, where the Court examined the government's inquiry into the content of a scholar's lecture at the University of New Hampshire. The Court ruled that

the government's interference with the subject matter of the lecture "unquestionably was an invasion of [the lecturer's] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread." 354 U.S. at 250. In so ruling, the Court cautioned that "to impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." The Court also recognized the dangers of infringing upon "such highly sensitive areas as freedom of speech . . . and freedom of communication of ideas, particularly in the academic community." *Id.* at 245.

Such concerns have been restated at critical moments during the last half century by this Court. In the course of invalidating a state loyalty oath imposed on university professors at the State University of New York, the Court in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), stated: "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of

orthodoxy over the classroom." Most recently, in sustaining a university's race-sensitive admissions policy, this Court reaffirmed "the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," declaring once again that, because of that "important purpose," "universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). This Court has consistently affirmed its deference, and has decreed the deference of the lower courts, to judgments made on academic matters by both university professors and administrators. *See Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.")

B. A severe curtailment of protection for job-related speech under the "public concern" rubric would be at sharp variance with the First Amendment values so forcefully reflected in this Court's academic freedom declarations.

The special concern of Amici in the present case derives directly from this unwavering affirmation of academic freedom as a

core First Amendment interest. The central premises of such protection would be poorly served – indeed, could be gravely undermined – by a narrowing of the "public concern" doctrine to exclude job-related expression. A brief review of the interests which this Court has deemed worthy of protection through academic freedom readily demonstrates that concern.

From the very beginning, this Court's solicitude for professorial speech has focused mainly on what is said in and near the classroom, the laboratory, and the library of the university campus – in short, speech that is indisputably within the scope of the speaker's employment as teacher and scholar. In *Sweezy v. New Hampshire*, the target of governmental inquiry that this Court found to be constitutionally impermissible was a series of lectures by a scholar at a state university. Both the opinion of the Court and Justice Frankfurter's seminal concurring opinion stressed the "vital role in a democracy that is played by those who guide and train our youth," concluding that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding. . . ." 354 U.S. at 250.

The *Keyishian* Court, two decades later, expressed special concern for "laws that cast a pall of orthodoxy over the classroom," noting the "transcendent value of [academic freedom] to all of us and not merely to the teachers concerned." 385 U.S. at 603. In sustaining race-sensitive admissions policies, first in *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978), this Court stressed the "freedom of a university to make its own judgments as to education [including] the selection of its student body." And a quarter century later, the *Grutter* Court emphasized in this same context of the admission of students the need for deference to the academic judgments of educators, "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment." 539 U.S. at 330.

In each of these decisions that establish the primacy of academic freedom as a First Amendment value, the expression for which protection was sought and granted has been at or near the core of what society expects its universities and their faculties to do. Consistently, this Court has focused on the need to permit the unfettered pursuit of knowledge, and the dissemination of such

knowledge, to students in the college classroom and to the larger community through other means such as scholarly publications, legislative testimony, and guidance to government agencies in the formulation of standards and policy.

The Court has never even hinted that First Amendment constitutional protection for academic freedom should abate as the dispute approaches the core of a professor's assigned tasks. To the contrary, a review of this Court's academic freedom decisions and declarations yields a diametrically opposed conclusion: The closer one comes to activity for which a university professor is trained, recruited, compensated and appraised, the more clearly does that activity need and deserve First Amendment protection. Thus, the Petitioners' notion -- that a public employee's job-related or job-required speech has somehow forfeited constitutional protection -- is totally at variance with nearly everything this Court has said about academic freedom.

C. Denying protection to university professors' job-related speech under the rubric of "matters of public concern" could drastically alter the disposition of most academic freedom litigation.

The lower federal courts have never suggested that First Amendment protection for professorial expression diminishes with proximity to the core of a teacher's or scholar's assigned tasks. Indeed, some courts have been less inclined to grant protection to speech unrelated to the academic setting and the campus community. Suffice it to note that in the view of such courts, *Pickering-Connick* principles fully encompass, and accord First Amendment protection to, professorial speech – without regard to the relationship between that speech and a scholar's academic discipline or assigned area of curricular responsibility.

Moreover, the rationale this Court has consistently invoked for its defense of academic freedom seems to apply with special force to statements made by university professors within their fields of expertise. As the 1915 Declaration of the AAUP stressed, the basic function of university professors "is to deal at first hand, after prolonged and specialized technical training, with the sources of knowledge; and to impart the results of their own

and of their fellow-specialists' investigations and reflection, both to students and to the general public, without fear or favor." 1915 Declaration at 294. The Declaration then added: "To the degree that professional scholars, in the formation and promulgation of their opinions, are, or by the character of their tenure appear to be, subject to any motive other than their own scientific conscience and a desire for the respect of their fellow-experts, to that degree the university teaching profession is corrupted; its proper influence upon public opinion is diminished and vitiated; and society at large fails to get from its scholars, in an unadulterated form, the peculiar and necessary service which it is the office of the professional scholar to furnish." *Id.* at 294-95. Thus, any suggestion that "matters of public concern" should not include job-related statements, or expression integrally linked to a public employee's assigned task, could have a potentially crippling effect on First Amendment protection for the most valuable and important types of professorial speech.

To appreciate the gravity of Amici's concerns about the potential impact of a reversal in this case, it is vital to consider the

full range of a university professor's responsibilities. Everyone who teaches at the post-secondary level is, of course, expected to devote substantial time, thought and effort to classroom instruction and the related tasks of academic advising, meeting with students, guiding theses and dissertations, and the like. In addition, university faculty members are expected to engage in substantial research, which is typically published. Most institutions of higher learning also expect their professors to engage substantially in professional service – appropriately at the departmental, school/college and campus level, but even more important in myriad ways that serve the discipline and the larger society. Thus, the obligations of the university professor surely include, but also go far beyond, teaching students in the classroom.

Three earlier cases illustrate the potentially alarming implications of a different view. In *Perry v. Sindermann*, 408 U.S. 593 (1972), this Court considered the status of a dismissed professor at a state college in Texas, who sought reinstatement. His employment had been terminated, allegedly because of testimony he gave to state legislative committees urging the elevation of his

institution to four-year status (a position disfavored by the governing board). *Id.* at 595. He had also endorsed public statements highly critical of the Board of Regents. *Id.* In holding that the professor could seek legal redress following his termination, no member of this Court remotely suggested that the force of his claim depended upon, or varied with, the nexus between his controversial public statements and the subject matter of his academic expertise. The Petitioners' argument invites an absurd conclusion: that the professor's statements would somehow merit less protection had his academic field been community college governance, and greater protection were they more remote from the subject he had been appointed to teach.

A rather different sort of case from the 1970s also provides an apt illustration of Amici's concerns. In *Cooper v. Ross*, 472 F. Supp. 802 (E. D. Ark. 1979), a state university professor was denied reappointment in substantial part because of public expression of his avowedly Marxist views about Western history, as well as his acknowledged membership in the Communist Party. The district court ruled that such expression on the professor's part

was protected by the First Amendment and accordingly decreed his reinstatement. *Id.* at 814-15. As in the *Sindermann* case, no distinction was drawn or even suggested between speech within the faculty member's field of expertise and statements remote from his academic specialty. A chemist's or classicist's views on Marxism would surely not have been more deserving of First Amendment protection than those of the historian who prevailed in the actual *Cooper* case.

Finally, in *Hardy v. Jefferson Cmty. College*, 260 F.3d 671 (6th. Cir. 2001), *cert. denied*, 535 U.S. 970 (2002), the Sixth Circuit strongly upheld First Amendment protection for a teacher's on-the-job speech. Kenneth Hardy, a community college instructor, lost his job for holding a classroom discussion to explore the impact of words like "nigger" and "bitch." *Id.* at 674. One student complained to her minister, who threatened to discourage other potential students from enrolling unless the school took "corrective action." *Id.* at 675. Despite their earlier assurances, college officials chose not to renew Hardy's contract, telling him that "there were no classes" for him to teach. *Id.* Although the school

contended that Hardy had no constitutional right to use those words in the classroom, the district court declared his speech to be on a matter of public concern, and thus protected under the *Pickering-Connick* test. *Id.* at 678. The Sixth Circuit agreed, affirming that Hardy had a clearly established right to his speech that outweighed the school's interests in limiting his words. "A teacher's in-class speech deserves constitutional protection," the court affirmed, and "[r]easonable school officials should have known that such speech, when it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment." *Id.* at 680, 683. This deference by the Sixth Circuit suggests that a consideration of "context," under the guidelines of the *Pickering-Connick* balancing test, lends particular weight to protection for in-class academic speech.

Should currently applicable and long-recognized principles be diluted by denying First Amendment protection to public employee speech that is job-related, or to statements that fall within a professor's area of assigned responsibility, cases such as *Sindermann*, *Cooper*, and *Hardy* would be analyzed very

differently. Indeed, the standard for which Petitioners argue here could preclude lower courts from considering a state university professor's claim that the administration had abridged free speech. So drastic a dilution of the current *Pickering-Connick* principles would effectively bar recovery to any faculty member at a public university who incurred official sanction on the basis of statements arguably relevant to his or her academic discipline.

The consequences of such a retreat could be truly frightening not only for the academic freedom of outspoken professors, but equally for students and for the larger society that now benefits from the First Amendment protection that scholars enjoy to speak publicly within their areas of expertise. Such a result would introduce a perverse irony: First Amendment academic freedom would extend *only* to those public statements on which faculty members were least well informed – matters that fell totally outside the fields in which they study and teach. Only those statements clearly beyond academic expertise would be considered "matters of public concern."

However the Court decides to define a matter of public concern under the facts of this case, it should be sensitive to how its decision applies to the university context. The Court has been vigilant in considering academic freedom implications when asked to apply traditional First Amendment doctrines to the academic setting. *Rust v. Sullivan* involved a challenge to government regulations, under which the government refused to fund certain activities, including speech. 500 U.S. 173 (1991). Chief Justice Rehnquist recognized in *Rust* that a different analysis would be necessary in the academic context: "[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by vagueness and overbreadth doctrines of the First Amendment." *Id.* at 200. Justices of this Court have tread carefully when asked to apply wholesale traditional First Amendment doctrines to colleges and universities. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 278-79 (1981) (Stevens, J., concurring) (noting that "public forum"

analysis "may needlessly undermine the academic freedom of public universities," and reasoning that educators should be free to decide whether to prefer a student rehearsal of *Hamlet* or the showing of Mickey Mouse cartoons because "[j]udgments of this kind should be made by academicians, not federal judges"); *Board of Regents v. Southworth*, 529 U.S. 217, 1346, 1361 (2000) (Souter, J., concurring) ("The University need not provide junior years abroad in North Korea as well as France, instruct in the theory of plutocracy as well as democracy, or teach Nietzsche as well as St. Thomas.") In his concurring opinion in *Southworth*, Justice Souter warned against applying the First Amendment doctrine of viewpoint neutrality to faculty speech within the University. *Id.* at 1357 ("Our decision ought not be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case.")

In the end, a blanket rule that no job-related speech by public employees is constitutionally protected could undermine the First Amendment protections traditionally afforded faculty speech

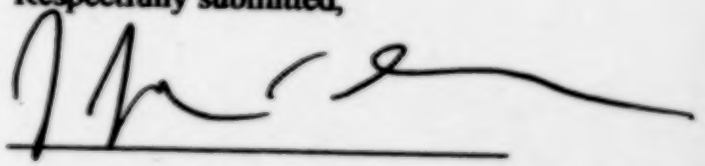
and ignore the special sensitivity this Court has paid in applying the First Amendment to colleges and universities.

CONCLUSION

For the foregoing reasons, Amici respectfully urge this Court to affirm the judgment of the court below. In so doing, this Court should reaffirm its commitments to the current concept of "matters of public concern" in regard to the speech of public employees and to its longstanding recognition of academic freedom as a "special concern" of the First Amendment.

Attorneys for Amici Curiae

Respectfully submitted,



J. Joshua Wheeler
Counsel of Record
Robert M. O'Neil
The Thomas Jefferson Center for
The Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911

Donna R. Euben
American Association of
University Professors
1012 Fourteenth Street, N.W.
Suite 500
Washington, DC 20005
202-737-5900

Of Counsel:
David M. Rabban
University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705-1012
512-232-1308

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

GREGORY O'DUDEN *
General Counsel

ELAINE D. KAPLAN
Senior Deputy General Counsel

BARBARA A. ATKIN
Deputy General Counsel

JULIE SARAH LEHRMAN
Assistant Counsel

NATIONAL TREASURY EMPLOYEES UNION
1750 H Street, N.W.
Washington, DC 20006
(202) 572-5500

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

No. 04-473

GIL GARCETTI, *et al.*,
Petitioners,

v.

RICHARD CEBALLOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

INTEREST OF THE *AMICUS* [1]

Amicus curiae, the National Treasury Employees Union ("NTEU"), is a federal sector labor organization that is the exclusive bargaining representative of approximately 150,000 federal employees in about thirty agencies and departments nationwide. NTEU's members at such agencies as the Bureau of Customs and Border Protection, the Nuclear Regulatory Commission, and the Food and Drug Admin-

[1] The parties have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk of the Court. No attorney for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, made any monetary contribution to the preparation or submission of this brief.

istration perform functions that are critical to the public safety and homeland security. Its members also occupy key positions in the formulation of tax policy at the Internal Revenue Service, and play important roles in regulating the financial industry in the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency. In these positions, employees often have occasion to express their opinions and to make recommendations to both agency officials and members of the public that they serve. And, like all federal employees, they have an obligation to disclose wrongdoing whenever they observe it on the job. They thus have a vital interest in the scope of constitutional protections afforded them by the First Amendment when they speak on matters of public concern related to their government employment, whether that speech occurs in the workplace or off-site.

In recognition of that vital interest, NTEU has frequently been a party or *amicus* in proceedings that involved issues relating to the First Amendment rights of federal employees. *See, e.g., United States v. National Treasury Employees Union*, 513 U.S. 454 (1995); *Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1998) (*amicus*); *Sanjour v. Envtl. Prot. Agency*, 56 F.3d 85 (D.C. Cir. 1995) (en banc) (*amicus*). It files this brief in order to provide the Court with information concerning the practical significance and potential consequences to public employees of the position advocated by petitioners, if it were to be accepted by this Court.

SUMMARY OF ARGUMENT

Speech by public employees on work-related matters—addressing current government policies or activities of their own departments or agencies, for example—is speech on classic matters of public concern. Petitioners would categorically deny constitutional protection to much of this speech, despite its importance to the public's understanding

of its government, whenever the speech can be characterized as "in furtherance of the employee's job duties." This approach would unnecessarily chill speech that furthers the interests of the public and the government itself. It is also based on a misreading of the precedent of this Court and is unworkable in its application.

Again and again, public employees, armed with their specialized expertise and data or other insights resulting from their work, have served the public interest by exposing wrongdoing or waste of government funds and by presenting unpopular but objectively sound conclusions and opinions, often in contexts that involve the performance of their duties—or that could be so characterized. This speech is entitled to constitutional protection, subject to the *Pickering* balancing test, consistent with this Court's longstanding protection of speech by public employees on matters of public concern. *See Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). As the Court has recognized, informed debate requires the input of public employees. In fact, the closer the relationship between employees' speech and their work duties, the better equipped the employees are to contribute to the public and the government interests. This is the very speech that petitioners would have this Court inhibit, by limiting the protection to speech by employees less intimately involved with the issue and therefore less able to contribute meaningfully.

Petitioners rest their argument on an artificial distinction between what they call "citizen speech" and "employee speech"; they define the latter to include all "work-required" speech. Petitioners argue that only "citizen speech"—as they define it—is entitled to constitutional protection. This distinction, based on the "hat" that the employee is wearing when speaking, is not supported by this Court's precedent. The references in this Court's precedents to "employee speech" and "citizen speech" were more in the nature of

shorthand terms, intended to aid in distinguishing between two possible types of expression, *both* of which consist of speech by individuals who are simultaneously "employees" and "citizens." Contrary to petitioners' view, the focus must remain on the subject matter of the speech and, specifically, on whether it addresses a matter of public concern or whether it involves a matter of purely personal concern.

Petitioners' proposed test not only leads to absurd results, but is unworkable. The inquiry into whether speech is in furtherance of an employee's duties is highly subjective and vulnerable to multiple interpretations. The proposed test also creates perverse incentives that thwart internal problem-solving on such vital topics as safety, scientific integrity, and mismanagement—all of which are matters of considerable public concern. Moreover, because *Pickering*'s balancing test provides ample protection to legitimate government interests, petitioners err in claiming that a limit on the scope of constitutionally protected speech is necessary to avoid disruption of government operations. There is, in short, no reason to disturb the long-standing framework under which both work-related speech and work-required speech on matters of public concern are weighed under the *Pickering* balance, in order to protect the interests of all: the public, the employee, and the government employer.

ARGUMENT

SPEECH BY A PUBLIC EMPLOYEE ON MATTERS OF PUBLIC CONCERN IS NOT STRIPPED OF CONSTITUTIONAL PROTECTION MERELY BECAUSE IT IS WORK-RELATED SPEECH MADE IN FURTHERANCE OF THE EMPLOYEE'S DUTIES

A. This Court Accords First Amendment Protection to Work-Related Speech by Public Employees on Matters of Public Concern

This Court has long recognized that one of the bedrock principles of our society is free and open debate. Public employees play an important role in the debate on public affairs. *See United States v. National Treasury Employees Union*, 513 U.S. 454, 464 (1995) (noting that federal employees have made "significant contributions to the marketplace of ideas"). Participation by public employees in "free and open debate [on important public questions] is vital to informed decision-making by the electorate." *Pickering v. Board of Educ.*, 391 U.S. 563, 571-72 (1968). It is also vital to informed decision-making by the government. Public employees make invaluable contributions, whether they express their opinions privately to their employer or openly, directly to the public. *See Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979).

There is no question that the government, in its capacity as employer, may impose restraints on the job-related speech of public employees that would be unconstitutional if applied to the public at large. *See Waters v. Churchill*, 511 U.S. 661, 671-675 (1994) (plurality). Nevertheless, the Court has granted First Amendment protection to work-related speech by public employees on matters of public concern. In *Pickering*, the Court adopted a balancing test under which the interests of the employee in commenting on matters of public concern are balanced against the interest of the government,

as employer, in promoting its efficient operation. *Pickering*, 391 U.S. at 568; *see also Connick v. Myers*, 461 U.S. 138, 145-47 (1983). This protection accorded to a broad range of speech by employees on issues relating to government operations well serves the public interest.

1. This Court's seminal case of *Pickering* is founded on the recognition that "public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public." *City of San Diego v. Roe*, 125 S.Ct. 521, 525 (2004); (citing *Pickering*, 391 U.S. at 572) ("Teachers are, as a class, the members of the community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent."); *see also Waters*, 511 U.S. at 674 (plurality) (observing that public employees "are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions"); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (citing *Waters*, 511 U.S. at 674) (explaining that retaliation for speech by government contractors may chill speech by those who, "because of their dealings with the government," may best know government ailments).

Indeed, informed decisions concerning public affairs can hardly be made if the opinions of the very members of the public most qualified to speak on such matters are categorically silenced. "[T]he threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574; *accord Rankin v. McPherson*, 483 U.S. 378, 384 (1987). The interests that would suffer, as a consequence, are not just those of the employee: "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Roe*, 125 S.Ct. at 525; *accord Pickering*, 391 U.S. at 572; *see also NTEU*, 513 U.S. at 470 (disincentive to federal employees' free speech imposes a "significant burden on the public's right to read and hear what the employees would otherwise have written and said"). Interference with this flow of information would significantly impair the public's ability to monitor the performance of essential government operations.

Finally, the government itself would be significantly injured if members of its workforce were discouraged from identifying problems in government initiatives that require correction. The government as employer, as well as the government as sovereign, benefits from constructive criticism and from prompt exposure of operational flaws, which enable it to take appropriate corrective action. *See, e.g., City of Madison v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 177 (1976) (highlighting board of education's interest in hearing teacher's views on school operations); *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986) (interests of employer and employee are co-extensive when employee reports misconduct; goal for both is proper functioning of organization).

2. In determining which speech by public employees is to be accorded the protection of the First Amendment and, therefore, subject to the *Pickering* balancing test, this Court examines whether the speech addresses a matter of "public concern" or whether it involves a matter "only of personal interest." *Connick*, 461 U.S. at 146-47.

Matters of public concern are broadly defined to include speech fairly related to "any matter of political, social, or other concern to the community." *Id.* at 146. Recently, the Court has further explained that matters are of "public concern" when the subject is of "legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *Roe*, 125 S.Ct. at 525-26.[2] This includes

[2] In *Roe*, the Court also examined whether the speech in question would have satisfied the definition of public concern articulated by the

information relating to actual or potential wrongdoing or breach of trust by a public official, and an agency's efficient performance of its duties. *Connick*, 461 U.S. at 146. It also includes "statements criticizing public policy and the implementation of it." *Rankin*, 483 U.S. at 387.[3]

Matters of purely private interest, which are not entitled to constitutional protection, most commonly include speech addressing a personal employment dispute, such as the employee's individual work-related grievances. *Connick*, 461 U.S. at 148-149; *accord NTEU*, 513 U.S. at 466 (speech involving only "complaint about a change in the employee's own duties" fails to meet the public concern test). This category, however, also encompasses other speech at work, unrelated to personal grievances, that simply does not amount to a matter of public significance,[4] as well as private off-duty

dissent in *Connick*: whether the employee "discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which . . . an elected official charged with managing a vital governmental agency, discharges his responsibilities." *Roe*, 125 S.Ct. at 526 (citing *Connick*, 461 U.S. at 163) (Brennan, J., dissenting).

[3] *See also Rodgers v. Banks*, 344 F.3d 587, 600-01 (6th Cir. 2003) (complaints by director of quality management for mental health facility implicated the public concern because they addressed facility's disregard of patient privacy); *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1292 (11th Cir. 2000) (alleged cover-up by police chief and officers of criminal conduct of a family member of elected official is matter of public concern); *Lewis v. Cowen*, 165 F.3d 154, 164 (2d Cir. 1999) ("the public fisc is a matter of public concern"); *Fikes v. City of Daphne*, 79 F.3d 1079, 1084 (11th Cir. 1996) (question of whether police officers are performing their duties is a public safety issue and therefore an issue of political or social concern).

[4] *See, e.g., Martin v. Parrish*, 805 F.2d 583, 585 (5th Cir. 1986) (profanity used by college professor in class while criticizing students' poor attitude); *Campbell v. Hamilton County*, 2001 U.S. App. LEXIS 22884 (6th Cir. 2001) (unpublished) (derogatory comment about a judge by a probation officer to probationer before hearing on probation violation).

expression by employees on non-work-related topics that does not add to the public debate.[5] *See Roe*, 125 S.Ct. at 526 (finding that the making and marketing of pornographic videotapes by an off-duty police officer was speech that "did nothing to inform the public about any aspect of the [police department's] functioning or operation" and did not relate to any other issue of concern to the community).

Applying these principles to the "enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal" (*Pickering*, 391 U.S. at 569) must be done on a case-by-case basis. This Court has repeatedly declined invitations to adopt a bright-line rule. *See id.* at 370 ("we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged"). *Accord Umbehr*, 518 U.S. at 678 ("*Pickering* requires a fact-sensitive . . . weighing of . . . interests); *Givhan*, 439 U.S. at 415 (declining to adopt bright-line rule that internal, work-related speech is unprotected). Instead, the Court examines the "content, form, and context of a given statement, as revealed by the whole record," to determine whether an employee's speech addresses a matter of public concern. *Connick*, 461 U.S. at 147-148. Of particular significance here is this Court's explicit refusal to limit constitutional protection to employee speech that is expressed in the public arena. Instead, the Court has held that speech does not lose its protection if it is expressed privately

[5] The government, of course, may only discipline an employee for off-duty misconduct if there is a sufficient showing of a nexus between the alleged misconduct and the employee's ability to accomplish his or her duties or some other legitimate government interest promoting the efficiency of the service. *See* 5 U.S.C. § 7513(a) (a federal employee may be removed "for such cause as will promote the efficiency of the service"); *accord* 5 C.F.R. §§ 731.201, 752.403. *See generally, Crofoot v. Gov't Printing Office*, 761 F.2d 661, 664 (Fed. Cir. 1985); *Doe v. Hampton*, 566 F.2d 265, 272 (D.C. Cir. 1977).

to the employer, rather than in a public setting. *Givhan*, 439 U.S. at 415. The focus is thus squarely placed on the subject matter of the given statement, rather than its audience.

The lower courts that have applied the *Connick/Pickering* test over the years have found a wide range of speech by public employees communicated at the workplace and/or on topics related to their public employment to involve matters of public concern.[6] This includes speech on work-time, in the workplace, to a co-worker,[7] a supervisor,[8] or some other

[6] At the same time, of course, much work-related speech may be unprotected if, for example, it does not "sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government." *Lee v. Nicholl*, 197 F.3d 1291, 1295 (10th Cir. 1999) (citation omitted). Petitioners are thus incorrect when they claim that "virtually all" job-required speech would be constitutionally protected if the lower court is not reversed. *See* Pet. Br. at 11. *But see* Pet. Br. at 36 (suggesting that protection of job-required speech would have a greater impact on those government offices where subjects related to matters of public concern are "constantly discussed" or "where employees' primary job duties are to speak about such matters").

[7] *See, e.g., Rankin*, 483 U.S. at 382 (clerk told colleague, after President Reagan was shot, that she hoped any subsequent attempt on his life would be successful); *Connick*, 461 U.S. at 149 (Assistant District Attorney circulated questionnaire soliciting views of colleagues on, *inter alia*, whether they felt pressured to work on political campaigns).

[8] *See, e.g., Givhan*, 439 U.S. at 413 (teacher's complaint to her principal about employment practices perceived to be racially discriminatory in purpose or effect); *Taylor v. Keith*, 338 F.3d 639, 641 (6th Cir. 2003) (police officers filed routine report indicating that another officer had problem with using excessive force); *Rodgers*, 344 F.3d at 592 (director of quality management wrote letter to hospital CEO complaining about hospital's failure to remedy problem of patient privacy); *Delgado v. Jones*, 282 F.3d 511, 514 (7th Cir. 2002) (police officer presented memorandum to his lieutenant which stated that his investigation led him to conclude that a close personal relative of an elected official was involved in criminal drug activity); *Dill v. City of Edmond*, 155 F.3d 1193, 1200-01 (10th Cir. 1998) (police officer wrote a letter to Chief of

supervisory body.[9] It also encompasses speech on breaktime but in the workplace,[10] and speech on the employee's own time, off-site, to an outside entity.[11] It even includes an employee's *refusal* to make a supervisor-ordered statement to a superior supervisory entity.[12] Topics have ranged from speech relating to the employee's working conditions[13] or those of co-workers,[14] to speech relating to the conditions of the employee's "customers."[15] Often, the speech reports the re-

Police stating that his on-the-job investigation led him to be aware of exculpatory evidence in a murder case).

[9] *See, e.g., Nicholl*, 197 F.3d at 1294 (letters to Board of County Commissioners); *Fikes*, 79 F.3d at 1081 (officer reported allegations of improper use of a confiscated vehicle and failure to terminate a high speed chase to the Alabama Bureau of Investigation); *Kennedy v. Tangipahoa Parish Library Sys.*, 224 F.3d 359, 363 (5th Cir. 2000) (library employee wrote letter to Library Board of Control and branch managers suggesting that library employees not be alone in library for safety reasons).

[10] *See, e.g., Waters*, 511 U.S. at 664-65 (nurse made statements to colleague, while at work but on a break, about hospital working conditions).

[11] *See, e.g., Pickering*, 301 U.S. at 566 (teacher wrote letter to newspaper editor criticizing Board of Education); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977) (teacher called radio station to publicize school's plan to implement teacher dress code); *Perry v. Sindermann*, 408 U.S. 593, 595 (1972) (advertisement critical of college administration appeared over teacher's name).

[12] *See, e.g., Lewis*, 165 F.3d at 159 (lottery officer refused to present proposed change to state lottery system to Board in positive light without presenting risks).

[13] *See, e.g., Kennedy*, 224 F.3d at 362-63, *supra*, note 9.

[14] *See, e.g., Connick*, 461 U.S. at 149, *supra*, note 7; *Givhan*, 439 U.S. at 413, *supra*, note 8; *Nicholl*, 197 F.3d at 1294, *supra*, note 9.

[15] *See, e.g., Rodgers*, 344 F.3d at 592-93, *supra*, note 8.

sults of an employee's investigation into misconduct by co-workers or public officials.[16]

The common denominator in all of these cases is obviously the work-related nature of the speech, whether because of the location where it is made or its content. The importance of the message to the public understanding—the degree of public concern implicated—is often directly correlated to the degree to which the message relates to the employee's duties. The more an employee knows about a particular topic (in many cases precisely because it is his or her particular area of work expertise), the more useful the speech will be in generating informed debate. The purpose of creating informed debate is ill-served by offering no First Amendment protection to the very speakers who can contribute the most.

B. Petitioners Would Deny First Amendment Protection to Much Work-Related Speech by Public Employees on Matters of Public Concern if It Happens To Be in Furtherance of the Employees' Duties

Petitioners ask this Court to adopt a new per se test, under which *all* employee speech found to be expressed "pursuant to the duties of employment" would be denied constitutional protection—regardless of whether it addressed a matter of public concern. Pet. Br. at 25-35. As we discuss below, this new test finds no support in this Court's jurisprudence. To the contrary, the Court's prior holdings point firmly to the opposite conclusion: that such speech is indeed protected, subject to the public concern test and, of course, the *Pickering* balancing test. In addition, as we demonstrate, the proposed new test is unworkable in application, unnecessary to protect

[16] *See, e.g., Taylor*, 338 F.3d at 640, *supra*, note 8; *Delgado*, 282 F.3d at 514, *supra*, note 8; *Baldassare v. New Jersey*, 250 F.3d 188, 192-93 (3d Cir. 2001); *Dill*, 155 F.3d at 1201, *supra*, note 8; *Fikes*, 79 F.3d at 1081, *supra*, note 9.

the government's legitimate interests, and will inevitably chill speech that furthers the interests not only of the speaker but also of the public and the government.

1. Petitioners have misread the *Connick/Pickering* framework as establishing a "citizen/employee" dichotomy, under which the "hat" worn by the employee at the time of the speech is determinative. Thus, in addition to determining whether the speech was on a matter of public concern or addressed purely personal matters, petitioners would have the courts evaluate whether the speech was made in the employee's "personal" capacity—deemed to be "citizen" speech —or whether it was made by the employee qua "employee." The latter category, according to petitioners, necessarily encompasses all speech that is variously described as "job-required" (Pet. Br. at 16), made "pursuant to the duties of employment" (*id.* at 25), or made "during the normal course and scope of employment, in accordance with the duties of employment" (*id.* at 27).[17] In essence, petitioners would try to identify a subset of employee speech that is job-required and deprive it of any constitutional protection.

There is nothing in *Connick*, *Pickering*, or any other precedent of this Court to indicate that the Court considers anything other than the speaker's message itself to be relevant to the first prong of the *Pickering* balancing test.[18] Certainly

[17] The United States, as *amicus*, prefers formulations that reference the carrying out of "job duties" or "job responsibilities." *See, e.g.*, U.S. Br. at 9, 15, 16, 25, 28.

[18] Petitioners misread *NTEU* in citing it as support for their claim that this Court places weight on the absence of any "relevance" to government employment in finding speech protected. Pet. Br. at 27. *See also* U.S. Br. at 17. The Court there stressed the lack of a nexus between the speech and the speakers' government jobs as part of its finding that the government's interest was slight and could not justify the burden placed on speech by the statute at issue. *NTEU*, 513 U.S. at 474. It certainly did not suggest that the speech would be unprotected—and the *Pickering* balance unnecessary—if the speech had had a closer tie to the employees' jobs.

there is nothing to show that the Court intended the role of the speaker to be dispositive. To the contrary, this Court in *Givhan* discussed *only* whether private expression is constitutionally protected, and did not find it necessary to determine whether the teacher was speaking as an "employee" or "citizen" when she raised her concerns about racially discriminatory practices in a meeting with her principal. 439 U.S. at 413-16.

In *Connick* itself, the Court focused only on the content of Myers' speech and did not address the fact that she was undeniably wearing her employee "hat" when she circulated the questionnaire on the job, during office hours, and to her colleagues. Had that questionnaire been a means of informing the public "that the District Attorney's Office was not discharging its governmental responsibilities in the investigation or prosecution of criminal cases," the Court suggested that Myers would have been engaging in speech "as a citizen" on matters of public concern. *Connick*, 461 U.S. at 148. That speech, of course, would have been intimately connected to her professional responsibilities as a prosecutor and arguably as "required" by that work as were Ceballos' disclosures in the instant case.

Petitioners err in attaching substantive significance to the reference in *Connick* to speech "*as a citizen* upon matters of public concern," which is compared to speech "*as an employee* upon matters only of personal interest." *Connick*, 461 U.S. at 147 (emphasis added). This reference is more accurately viewed as a shorthand way of capturing and distinguishing between the two possible types of expression, *both* of which consist of speech by *employees* that has some nexus to government employment. As shown *supra*, pp. 8-9, "employee speech" most often refers to speech relating to employee grievances or other personal problems of the employee in the workplace of limited general interest. Similarly, under the *Connick/Pickering* line of cases, "citizen

speech" refers to speech by employees either at work or off-work but on work-related matters, in both instances where the speech has ramifications beyond the workplace. Thus, "citizen speech" simply connotes "major issue of broad import" while "employee speech" connotes "minor, personal issue."

There is no indication that the Court intended any other weight to be accorded to the terms. Indeed, as shown below, the distinction that petitioners would draw between "employee" and "citizen" is illusory and virtually impossible of application. It is axiomatic that public employees are simultaneously citizens who largely retain their First Amendment right to comment on important issues of the day. *See Pickering*, 391 U.S. at 568.[19] They can speak as "citizens"—meaning on important issues—both on and off the job. Attempting to ascertain the "capacity" in which they are speaking at any particular time simply does not advance the relevant inquiry, which is whether the message addresses a matter of public concern.

2. The test proposed by the petitioners leads to artificial distinctions and absurd results. There can be no merit to a test that would deprive any constitutional protection to Pharmacologist A's discussion with his supervisor about his findings regarding the side effects of a drug that he was assigned to analyze, while protecting that identical speech if uttered by Microbiologist B who learned of the issue from his

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[19] *Pickering* similarly referred to "citizen speech" in discussing the need to balance "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. This reflects the Court's concern for protecting all speech by public employees on matters of public concern, subject, of course, to the balancing test, for the critical reason that they *are* citizens and have a strong interest in making their views heard.

friend A in the FDA cafeteria. It is similarly absurd—and contrary to this Court's holding in *Givhan*—to deny protection to A's internal communications with his superiors on the side effects, while protecting A's lunch-time conversations with B (and A's subsequent efforts to alert the public to the drug's harmful potential).

In drawing such arbitrary and irrational distinctions, petitioners have created perverse incentives that run counter to broader government interests. The government has a critical interest in establishing an environment in which employees do not fear to raise concerns in a timely fashion on important issues, such as potential problems with the construction of a nuclear power plant, dangerous lead levels or bacterial contamination in the water supply, or gaps in border crossing controls that could permit entry by a terrorist. It similarly has an important interest in resolving allegations of wrongdoing or disputes over policy before the problems reach a critical level. In an optimum world, this is done quickly and internally. Neither of these interests is advanced by petitioners' proposed test; to the contrary, they are affirmatively thwarted by it.

Speech in furtherance of employees' duties—speech that perhaps has the most potential of making an informed contribution to the public debate—is also the speech that is the most vulnerable to suppression. Agencies, under the guise of supervisory review or high-level policy review, have been known to tone down messages of potential hazards, or to censor them entirely. Career public servants have seen their reports amended or suppressed because they did not conform to the general policy objectives or political imperatives of the current political appointees heading their respective agencies or other reviewing authorities within the Administration. Dr. David Graham, the scientist with the FDA who was directed

to soften his conclusions regarding dangerous side effects of Vioxx, is only one of many examples.[20] Those who protest

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[20] Graham, associate science director at the Office of Drug Safety at the FDA, prepared a study in which he concluded that the pain drug Vioxx had dangerous side effects. He claims that he was pressured by superiors to soften his conclusions, and that he complied only as much as he could to avoid compromising his "deeply held convictions." He was consequently threatened and ostracized by the FDA. The drug manufacturer withdrew Vioxx from the market when an independent study confirmed his conclusions. *FDA Failed Public on Vioxx, Scientist Says, at* http://www.msnbc.msn.com/id/6520630 (last updated Nov. 19, 2004); Marc Kauffman, *FDA Official Alleges Pressure to Suppress Vioxx Findings,* Washington Post, Oct. 8, 2004, at A23.

See also Andrew Eller, a biologist working on Florida panther-related issues with the U.S. Fish and Wildlife Service, who was terminated after accusing his agency of purposely relying on flawed scientific information regarding the Florida panther's likelihood of survival in the face of real estate development. The agency did so, he maintained, in order to facilitate the granting of construction permits to influential developers. The agency has reinstated Eller, conceding that some of his conclusions were correct. Manuel Roig-Franzia, *Biologist Rehired by the U.S. Fish and Wildlife Service*, Washington Post, July 6, 2005, at A15. It has been alleged that the agency is under severe pressure from its political superiors to accommodate campaign contributors. *See Public Employees for Environmental Responsibility: Campaigns: Scientific Integrity at* http://peer.org/campaigns/eller/index.php (last visited July 20, 2005).

John Fitzgerald, an environmental analyst with the U.S. Agency for International Development in 2002, was responsible for monitoring compliance on certain overseas development projects. He attempted to report to Congress legal violations and environmental mismanagement regarding questionable energy projects in Africa, South America, and Eastern Europe, but Treasury officials removed the information from his report before it reached Congress. His position was subsequently eliminated. *Whistleblower's Information Deleted by Treasury Department Before Report Went to Congress, at* http://www.bushgreenwatch.org/mt_archives/000194.php (September 28, 2004). In September 2004, the Merit Systems Protection Board granted him a hearing on the merits of his allegations, finding that he had made "a non-frivolous allegation of

and persist in pressing their conclusions—particularly those who feel compelled to take the dispute to Congress or the media—are prime targets for retaliation.

Denial of constitutional protection to such speech creates an obvious disincentive to report misconduct or to voice opinions that may be unpopular with superiors or managers. Perversely, the greater the magnitude of the problem and the cost, monetarily or politically, of correcting it, the greater is the risk to the small voice who is urging caution. Not all employees have the courage of Coleen Rowley, the FBI employee who attempted to draw attention within the FBI to its institutional failure to respond to indicators about impending terrorist attacks.[21] The employee who identifies a

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a protected disclosure." *Fitzgerald v. Dept. of Agric.*, 97 MSPR 181 (2004). His case was subsequently settled.

Richard Foster, Medicare's chief actuary, was responsible for providing cost estimates to Congress regarding several Medicare proposals under debate. Foster estimated that the actual cost of legislation would be 25% to 50% higher than the administration's public estimates but was prevented from providing his finding to Congress by the former Administrator of the Centers for Medicare and Medicaid Services (CMS). An investigation by the HHS Office of Inspector General concluded that CMS failed to provide the proper information requested by Congress and that the Administrator had warned Foster that he would be disciplined if he released his disfavored findings. *Statement of Dana Corrigan, Acting Principal Deputy Inspector General Department of Health and Human Services on Thomas Scully and Richard Foster Investigation* 07/07/04, *available at* http://oig.hhs.gov/publications/pressmaterials.html; *Medicare Chief Actuary Foster Says He Informed White House Officials in June That Medicare Legislation Would Cost More Than Lawmakers Expected*, (March 25, 2004) *available at* http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint+3&DR_ID=22867.

[21] Rowley, an FBI employee in the Minneapolis field office, wrote a letter to FBI Director Robert Mueller outlining her concerns that the FBI had not adequately responded to internal memoranda and other indicators about impending terror attacks prior to September 11, 2001. She attempted, without success, to contact Mueller's office to alert him to errors in his statements post-September 11 regarding the absence of advance warning

serious institutional lapse that may have contributed to the nation's vulnerability to a terrorist attack, like the employee who sees a safety risk threatening an imminent space shuttle flight or the opening of a new nuclear power plant, needs extraordinary courage to persist, once her views are heard and brushed aside. The loss of constitutional protection to this dissent only increases the disincentives. If these employees choose the safer course and remain silent, the cost to the public could be enormous. Protection of employees' freedom to speak out on such issues of public concern is essential to the proper and efficient functioning of agencies and the assurance of a safer and better-run nation.[22]

At the same time, it is essential that employees not be discouraged from raising these issues in the first instance within the agency. Denial of constitutional protection to speech made to a supervisor in the course of an employee's duties creates a strong disincentive to solve problems internally. Anyone advising an employee anxious to report a major problem uncovered on the job would have to counsel the employee to consider bringing the debate directly into

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indicators. She was therefore forced to contact Congress with her information. *FBI Whistleblower Describes "Roadblocks"*, *at* http://archives.cnn.com/2002/ALLPOLITICS/06/06/terror.lapses/ (June 6, 2002).

[22] Whether there are whistleblower protections is, of course, irrelevant to whether there should be constitutional protection. But, it should be noted that whistleblower protections are severely limited. Courts have denied whistleblower protection to employees who are performing their normally assigned duties in reporting waste, fraud and abuse. *See Sasse v. United States Dept. of Labor*, 409 F.3d 773 (6th Cir. 2005); *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1351-54 (Fed. Cir. 2001); *Willis v. Dept. of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998). The Federal Circuit has also held that mere differences of opinion on debatable policy decisions by agencies do not constitute protected disclosures under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8). *See White v. Dept. of Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2004).

the public forum, even given the risks that such disclosure would entail.

These difficult issues are circumvented if the government preserves current incentives to solve problems internally. A harmonious public employer-employee relationship is to be fostered, not hindered; such a relationship maintains and improves the organization in a more efficient manner than if the employee is forced to seek external aid.

3. Aside from its substantive defects, petitioners' test is, bluntly put, unworkable. As a practical matter, it would be impossible in the case of many government positions to determine precisely what speech was "required" or made "in furtherance of the employee's duties."

Petitioners themselves do not argue that all speech "on the job" or made while the employee was "on the clock" is unprotected. They similarly do not argue that all speech that *relates to* the employee's job is unprotected. Thus, they evidently concede that much speech on work-related topics by public employees to their co-workers or supervisors, during working hours and in the workplace, is still protected under their formulation. Courts attempting to apply their proposed test would therefore be faced with the daunting and subjective task of determining what, precisely, were the employee's job responsibilities and how the speech in question meshed with those duties.

The employee's position description is not likely to be particularly helpful in resolving this factual issue. Not all public employees have formal position descriptions; if they do have one, it often does not accurately reflect their actual daily duties. Some define their own assignments. Virtually all have occasion to perform tasks that are not specified among their formal job responsibilities, ranging from clerical support tasks such as word-processing, copying, and faxing, to training of colleagues, to filling in as needed to perform the

notorious "other duties as assigned." This is particularly true in times of crisis.[23] Moreover, in the federal government with the increased emphasis on the need for greater personnel flexibilities, more and more employees may be functioning under unwritten "performance expectations" that could take the form of "individual, team, and/or work unit goals or objectives." Department of Homeland Security Human Resources Management System, 70 Fed. Reg. 5272, 5274 (Feb. 1, 2005); *see also id.* at 5303 (to be codified at 5 C.F.R. § 9701.406(c)). These unwritten and vaguely defined "expectations" would compound the difficulty of determining exactly what the job "requires."

The lack of clarity in the precise nature of the employee's duties, however, is only part of the problem. Perhaps the more serious barrier to application of petitioners' proposed test is the broad discretion given to many government employees (particularly mid-rank and senior-level employees) in determining how they are to carry out their job responsibilities. The federal government, for example, employs a host of highly educated professional employees: scientists; engineers; architects; teachers and professors at primary, secondary, undergraduate and graduate levels; attorneys and judges; medical doctors and other health care professionals; accountants; economists; mathematicians and statisticians; historians; and chaplains—to name just a few. *See, e.g., Handbook of Occupational Groups and Families*, *available at* http://www.opm.gov/fedclass/gshbkocc.pdf

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[23] As illustrated in the wake of September 11, 2001, public employees have historically done whatever is necessary to help handle emergency situations. In any event, even assuming, *arguendo*, that employees did not volunteer, governments have ample flexibility to assign additional responsibilities. The Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.*, which covers labor relations in the federal sector for a majority of federal employees, specifies that agencies have the right "to take whatever actions may be necessary to carry out the agency mission during emergencies." 5 U.S.C. § 7106(a)(2)(D).

(August, 2002). These professionals fulfill their responsibilities in accordance with the general guidelines of their employing agency, but also in accordance with their profession's ethical proscriptions or standards and their own educated judgment. They frequently have enormous discretion in deciding, not only *what* they should be saying or doing, but also *how* and *when* they should be saying or doing it.[24] A chaplain with the Veterans Administration, a professor at the Naval Academy, an economist with the Federal Reserve, or a pharmacologist with the Food and Drug Administration does not have neatly cabined duties or predetermined methods for achieving his or her objectives.[25]

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[24] The Solicitor General is flatly wrong in claiming that public employees have "no personal interest" in the content of speech in furtherance of their duties. U.S. Br. at 19. As the majority pointed out in the decision on review, for many employees, "promoting the public good is a deeply personal mission that is at least as important as personal career advancement." *Ceballos v. Garcetti*, 361 F.3d 1168, 1175 (9th Cir. 2004). Public employees like the scientists at the Nuclear Regulatory Commission and the Food and Drug Administration care deeply about the issues on which they work; their professional conclusions are their own, the product of their educated judgments and the tenets of their profession. While the government employer obviously sets the general parameters of their work (and can discipline them for unacceptable performance), the employees themselves are personally responsible for the validity of their conclusions. Indeed, NRC and FDA both give employees the right to preserve in the record their professional disagreements of opinion. *See* 21 C.F.R. § 10.70 (FDA); NRC Directive 10.159 (The NRC Differing Professional Opinions Program). In both agencies, however, employees care so deeply about the integrity of their professional opinions, and feel so vulnerable to retaliation, that NTEU has negotiated contractual rights paralleling and supplementing those agency-mandated procedures. *See* NTEU-FDA Collective Bargaining Agreement, Art. 5, Sec. 20; NTEU-NRC Collective Bargaining Agreement, Art. 3.9.

[25] The difficulty in distinguishing between "job-related" and "job-required" speech is not, of course, limited to speech by professional employees. To illustrate: Most government employees are required to attend internal office meetings, to obtain general instructions or assignments, but it may be far from clear whether their decision to speak up at a meeting, volunteering concerns or lodging objections, is required by their job. Similarly, many government employees, such as IRS Revenue Officers and CBP Officers (formerly Customs Inspectors), regularly interact with members of the public in situations where it is virtually impossible to determine which statements are "job-required" and which are only "job-related."

Whether a particular report, speech, letter, or conversation with a member of the public is "required" by the job or only "related to" it may be impossible to determine, either by the affected employee, by his or her manager, or by the reviewing court, given the absence of a clear line between the two concepts.

4. The error in focusing on whether the speech is "required by" or "in furtherance of" employees' duties is further illustrated by the numerous responsibilities imposed on employees that are unrelated to their particular work assignments. The clearest example is the virtually uniform obligation imposed on federal executive branch employees to report misconduct to the appropriate authorities, even when investigation of misconduct ordinarily forms no part of the employees' duties.

Government-wide regulations require all executive branch employees to "disclose waste, fraud, abuse, and corruption to appropriate authorities." 5 C.F.R. § 2635.101(b)(11). Individual agencies impose similar obligations, which are often posted at the worksite. The Department of Treasury, for example, requires employees to report "any information" indicating that an employee or contractor engaged in criminal conduct or violated the rules of conduct. 31 C.F.R. § 0.107(a)(3). Employees of the Bureau of Customs and Border Protection (CBP), Department of Homeland Security, are subject to disciplinary action if they fail to report information concerning the violation of a law, policy, or procedure by a fellow CBP employee. *See U.S. Customs and Border Protection Table of Offenses and Penalties, Instruc-*

tions on Use, *available at* http://www.customs.gov/xp/cgov/careers/neo_kit/additional_info/standards_of_conduct/tb_off_penalties.xml (last visited July 20, 2005). Thus, it is fair to say that a federal employee attempting to report government corruption or other malfeasance is merely acting in furtherance of his duties, and would have no constitutional protection against retaliation for doing so, if petitioners' formulation were adopted by this Court.

5. Finally, the adoption of petitioners' test is simply not necessary to protect the government's interests. There is no basis for the contention by petitioners and their *amici* that protection of job-required speech will lead to an "operational nightmare" for government agencies, under which managers attempting necessary and appropriate employment action would be chilled and the courts inundated with a flood of constitutional cases. *See* Pet. Br. at 35-40; U.S. Br. at 22.

As an initial matter, it bears emphasis that the Ninth Circuit's protection of job-required speech is, and has been, the prevailing judicial position for many years. *See* Respondent's Br. in Opposition at 11-18. During this time, there has hardly been a flood of cases threatening to overwhelm the courts. Those cases that are filed in federal court have been, and can continue to be, effectively resolved using the *Pickering* balance.

Pickering requires a "fact-sensitive and deferential weighing of the government's legitimate interests." *Umbehr*, 518 U.S. at 677. In *Umbehr*, the Court concluded that "proper application of the *Pickering* balancing test [can] accommodate the differences between employees and independent contractors," providing the necessary "nuanced approach [that] recognizes the variety of interests that may arise . . . ." *Id.* at 678. Those same principles apply with even greater force here, where the balancing requires only the traditional weighing of the government's interests in effective and

efficient operations against the employee's interest in speaking about matters directly related to his or her duties.

The *Pickering* approach readily accommodates the concerns raised here by petitioners and their *amici*. The government, after all, need only show that its belief that the speech would disrupt the workplace was *reasonable*. *See Waters*, 511 U.S. at 680 (plurality); *id.* at 684-85 (Souter, J., concurring); *Connick*, 461 U.S. at 154. The potential for disruptiveness and interference with legitimate government operations is manifest in the hypothetical cases of an attorney who filed a brief making representations contrary to the instructions of his superiors (U.S. Br. at 22), a White House press secretary who deliberately ignored the President's instructions on the message to be delivered to the press corps (Pet. Br. 36), or a teacher who discussed birth control in a class in violation of school board policy (Nat'l School Boards Assn. Br. at 19).[26] In each of those instances, the interests of the government would readily outweigh the employee's interest in expression. *See, e.g., Waters*, 511 U.S. at 681 (plurality termed the potential disruptiveness enough, "[a]s a matter of law," to outweigh "whatever First Amendment value the speech might

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[26] Petitioners and the Solicitor General analogize employees' work-required speech with government-funded speech, arguing that it can control the message because it has funded the speech. *See* Pet. Br. at 32-34; U.S. Br. at 19-21. In those cases, however, the government has directed that a certain message be conveyed through its funding and is responsible for the content of the state-funded speech. *See Board of Regents of the Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 229 (2000). Assuming, for the sake of argument, that government-funding cases are applicable at all, their relevance would be confined to cases where the government has directed the employee to deliver a specific message, as in the case of an agency spokesperson. In most cases, of course, the government has not directed its employees to convey a specific message. Instead, it has assigned them tasks, leaving it to them to form judgments and convey their conclusions drawn from their execution of those tasks.

have had"). The nature of the employee's responsibilities and the fact that the expression was made in furtherance of the employee's duties might well be relevant factors adding to the weight of the government's side of the balance.[27] They are not, however, relevant to the *other* side of the balance: whether the speech addresses a matter of public concern.

In short, petitioners have no basis for their dire predictions of an increased litigation burden if allegations of retaliation for speech made in the course of the employee's duties are allowed to survive a motion to dismiss. Even assuming they are correct that the balance cannot be struck in favor of the government as a matter of law (*but see Waters*, 511 U.S. at 681), the government's interests are amply protected under the *Pickering* balancing test. Moreover, we must underscore that adoption of petitioners' proposed test is hardly likely to reduce the litigation burden. As discussed above, courts would be required to wrestle with difficult evidentiary questions regarding the nature of the employee's duties, whether the speech was in furtherance of those duties, and—perhaps worst of all—whether the person was speaking as a "citizen" or an "employee." It seems highly unlikely that these issues could be resolved by motion, without an evidentiary hearing.

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[27] Without suggesting how it would resolve the balance in any specific situation, the Court noted in *Pickering* that the balancing could be affected by such considerations as whether there was a great need for confidentiality or whether "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them . . . ." 391 U.S. at 570 n.3. *Accord Rankin*, 483 U.S. at 390-91 (in weighing the State's interest, "some attention" must be paid to employee's job responsibilities, for the "burden of caution" borne by the employee varies with "the extent of authority and public accountability" the employee's job entails); *Lewis*, 165 F.3d at 162 (*Pickering* balance affected by nature of responsibilities, including degree of confidentiality, policy-making, or public contact in employee's job).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

GREGORY O'DUDEN *
General Counsel

ELAINE D. KAPLAN
Senior Deputy General Counsel

BARBARA A. ATKIN
Deputy General Counsel

JULIE SARAH LEHRMAN
Assistant Counsel

NATIONAL TREASURY
EMPLOYEES UNION
1750 H Street, N.W.
Washington, DC 20006
(202) 572-5500

* Counsel of Record

Counsel for Amicus Curiae

(17)

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Supreme Court of the United States

GIL GARCETTI, ET AL.,

Petitioners,

v.

RICHARD CEBALLOS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA AS AMICI CURIAE SUPPORTING RESPONDENT

MICHAEL C. SMALL
AKIN GUMP STRAUSS HAUER & FELD L.L.P.
2029 Century Park East, Suite 2400
Los Angeles, California 90067
Telephone: 310-229-1000
Facsimile: 310-229-1001
Counsel of Record

JEFFREY L. FISHER
Co-Chair, NACDL Amicus Committee
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101

STEVEN R. SHAPIRO
ACLU FOUNDATION
125 Broad Street
New York, New York 10004

PETER ELIASBERG
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Blvd.
Los Angeles, California 90026

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL's more than 12,500 direct members – and 90 state, local, and international affiliate organizations with another 35,000 members – include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Southern California is one of the ACLU's regional affiliates. Since its founding in 1920, the ACLU has appeared before this Court in numerous free speech cases, both as direct counsel and as amicus curiae, including a series of cases that have helped define the free speech rights of public employees.

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for amici curiae certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for amici has made a monetary contribution to the preparation and submission of this brief.

STATEMENT OF THE CASE

Respondent Richard Ceballos, a Deputy District Attorney in Los Angeles County, was carrying out his job responsibilities when he investigated allegations that a deputy sheriff had lied in an affidavit used to obtain a search warrant that led to a prosecution brought by the District Attorney's office. After completing his investigation, Ceballos concluded that the deputy sheriff had, at minimum, grossly misrepresented the facts. Pet. App. 2-3. In light of that conclusion, Ceballos wrote a memorandum to his immediate supervisor in which he recommended that the prosecution be dismissed. Pet. App. 3-4. The supervisor rejected Ceballos' recommendation and the prosecution went forward. Pet. App. 3-4, 53-55.

Ceballos alleges that Petitioners subsequently retaliated against him on account of his memorandum in violation of his First Amendment rights. Pet. App. 4-5. In suing the Petitioners, Ceballos relied on this Court's precedents establishing that government employees have a First Amendment right to speak on matters of public concern, which can be overcome only if the government demonstrates that the employee's speech interferes with the functioning of the public workplace. Pet. App. 2.

The district court granted summary judgment to Petitioners. It held that even though Ceballos' memorandum addressed a matter of public concern, this communication was not protected by the First Amendment because it was made by Ceballos in the discharge of his employment responsibilities as a prosecutor. Pet. App. 62. The district court also said that even if Ceballos' job-related speech were protected by the First Amendment, this constitutional guarantee was not clearly established

at the time of the alleged retaliatory action against him, and therefore Petitioners were immune from suit. Pet. App. 66.

The court of appeals reversed and remanded for further proceedings. It held that Ceballos' memorandum was protected by the First Amendment because it addressed a matter of public concern (*i.e.*, allegations of corruption and wrongdoing in law enforcement). Pet. App. 10. The court of appeals said that the position that the First Amendment did not protect speech of government employees on matters of public concern that is made in the discharge of employment responsibilities was foreclosed by prior circuit precedent, and, in any event, was incorrect. Pet. App. 11-13. The court of appeals also held that Ceballos' interest in free speech was not outweighed by the asserted interest of the District Attorney's office in promoting workplace efficiency. Pet. App. 22. Finally, the court of appeals held that Petitioners were not immune from suit because it was clearly established in the circuit that government employees have a First Amendment right to speak on matters of public concern made in the discharge of employment responsibilities. Pet. App. 24.

Judge O'Scannlain wrote a special concurring opinion. He agreed that prior circuit precedent foreclosed the argument that the First Amendment did not protect speech of government employees on matters of public concern that is made in the discharge of employment responsibilities. Pet. App. 32-33. He opined, however, that this precedent was inconsistent with Supreme Court decisions delineating the First Amendment rights of

government employees, and therefore should be overruled by the circuit. Pet. App. 35-36.

SUMMARY OF ARGUMENT

Two basic principles have applied to the free speech claims of government employees for almost forty years now. First, government employees have a First Amendment right to speak on matters of public concern. Second, government employers can trump that right only by demonstrating that an employee's speech interferes with the government's interest in the efficient operation of the public workplace. Petitioners and the United States urge the Court to create a *per se* exception to this longstanding constitutional framework for the "job-related" speech of government employees. Under the proposed exception, government employees would have no First Amendment right to speak on matters of public concern when that speech is made in the discharge of their employment responsibilities, even if the speech has no impact on the functioning of the public workplace. We believe that adoption of this exception would be unwise.

First, elimination of First Amendment protection for the job-related speech of government employees would impede effective policymaking. Many government employees have substantive expertise. They are tasked by their government employers with using that expertise to recommend policy options to agency higher-ups. Accordingly, open discourse between government employees and their superiors enhances the formulation of sound public policy by broadening the range of policy options from which policymakers can choose. Furthermore, by facilitating

deliberation in policymaking, such discourse also advances the values of self-government that are at the core of the First Amendment. Stripping away all First Amendment protection for the job-related speech of government employees would tend to chill the candor of communications in the public workplace, and thereby deprive policymakers of informed views on which to base their policy determinations. In the end, the government's decisions will suffer for it, as will the public in whose name the government acts.

Second, elimination of First Amendment protection for the job-related speech of government employees would disregard the strong personal interest that government employees have in their speech on matters of public concern on which they work. It is the job of many government employees to communicate to superiors their own views on such matters. This speech is therefore inherently personal. The proposed exception for the job-related speech of government employees would mistakenly treat such expression as the speech of the government itself. Under this Court's government speech precedents, a government employee does not lose her personal stake in job-related speech, and thus the speech does not become the government's speech, merely because her expression is made in the discharge of her employment responsibilities. Rather, the government employee's expression is that of the government's only when the government pays the employee to communicate the government's views on a subject, not her personal views.

Third, elimination of First Amendment protection for the job-related speech of government employees would have particularly negative ramifications in the law enforcement setting. This Court repeatedly has described the criminal process as a search for truth in which the

government wins when justice is done in a particular case, even if the government loses the case. This truth-seeking function of the criminal process is served when police and prosecutors are encouraged to communicate frankly to their superiors, and to give honest assessments as to whether an arrest should be made or a criminal trial initiated. Without the First Amendment to buttress them, however, police and prosecutors are less likely to speak up and be counted when they believe that the foundation of a criminal proceeding initiated by their agencies is infirm, much to the detriment of the quest for the truth.

ARGUMENT

For nearly four decades, this Court has treated speech by government employees on matters of public concern as presumptively protected by the First Amendment. This presumption can be overridden only if the employee's interest in the speech is outweighed by the government's interest, as employer, in the orderly operation of the public workplace and the efficient delivery of public services by public employees. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 140 (1983).

The Petitioners and the United States seek to carve out a blanket exception to this well-entrenched constitutional framework for "job-related" speech of government employees. Under this exception, First Amendment protection would be eliminated altogether for speech by government employees on matters of public concern that is communicated in the performance of the employees' job

responsibilities, even if the speech does not impair the operation of the public workplace or the delivery of public services. Pet. Br. at 25; U.S. Br. at 10. In our view, eliminating First Amendment protection for the job-related speech of government employees would be seriously mistaken in at least three respects. First, it would impede the formulation of sound public policy by chilling the expression of government employees with substantive expertise who are tasked with communicating to government decisionmakers their views on the matters of public concern on which they work. Second, it would discount the deep personal stake that government employees have in their speech on matters of public concern on which they work by mischaracterizing such speech as that of the government itself. Third, it would have particularly adverse consequences in the law enforcement setting, where candor on the part of police and prosecutors is imperative if the truth-seeking function of the criminal process is to be honored.[2]

A. Eliminating First Amendment Protection For Job-Related Speech Of Government Employees Would Impede The Formulation Of Sound Public Policy By Chilling Candid Communications To Government Decisionmakers In The Public Workplace.

For many government employees, speaking about matters of public concern on which they work is a critical

[2] As Respondent demonstrates in his brief, the proposed exception also finds no support in this Court's precedents charting the First Amendment boundaries of government employee speech. We do not review that terrain in this brief.

aspect of their day-to-day job responsibilities. Take the following examples. The scientist at the Food and Drug Administration who examines the safety of a new pharmaceutical. The consumer fraud specialist at the Federal Trade Commission who studies various methods of preventing identity theft. The economist at a state budget and finance department who analyzes the fiscal implications of a tax cut proposal. The urban planner in a municipal land use agency who evaluates the impact of a large-scale economic development project. For these employees, communication on the policy matters on which they work is a core function of their job. All are tasked with applying their substantive knowledge to the problem at hand, reaching their own views on what they think is the desired policy choice, and making a recommendation to superiors within their agencies who, in turn, select a particular policy to adopt.

Respondent Richard Ceballos acted in this same vein. As part of his job duties as a supervising attorney in the Los Angeles County District Attorney's office, he investigated allegations that a law enforcement officer had lied in an affidavit used to obtain a search warrant that led to a prosecution – allegations that indisputably related to a matter of public concern. Pet. App. 62-63. Based on his investigation, Ceballos reached the conclusion that the prosecution should be dismissed, and he communicated that recommendation to his superiors. Pet. App. 3-4.

Petitioners and the United States discount entirely the benefits that inure to government decisionmaking – and ultimately to society at large – when government employees are encouraged to speak frankly and openly to higher-ups in the public workplace about the matters of public concern on which they work. Government agencies

are staffed by employees who bring substantive expertise to the resolution of complex public policy issues. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 865 (1984). As part of their jobs, these employees communicate to decisionmakers their views on those issues – views they form by applying their expertise. When this channel of communication between government employee and government employer is left largely unfettered, policymakers have a more informed and broader range of policy options from which to choose. In short, the free flow of information within the public workplace serves to facilitate the formulation of sound public policy. *See Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) ("[P]ublic debate may gain much from the[] informed opinions" of government employees.); *id.* at 699 (Stevens, J., dissenting) ("Government agencies are often the site of sharp differences over a wide range of important public issues. In offices where the First Amendment commands respect for candid deliberation and individual opinion, such disagreements are both inevitable and desirable."); *see also City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 177 (1976) (curbing teachers' speech to board of education about school operations "would seriously impair the board's ability to govern the district").

Petitioners and the United States overlook an additional benefit of the job-related speech of government employees. By fostering deliberation on public policy, such speech also advances the values of republican self-government that lie at the heart of the First Amendment. *See* Cass R. Sunstein, *Democracy and the Problem of Free Speech* 241-42 (1993) (free speech guarantees of First Amendment reinforce republican system of self-government, which contemplates "discussion and debate among people who are genuinely

different in their perspectives and position, in the interest of creating a process through which reflection will encourage the emergence of political truths"); Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245, 255 ("The First Amendment [protects] the freedom of those activities of thought and communication by which we 'govern.'"); *see also Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1965) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("public discussion is a political duty" in the American system of self-government).[3]

Petitioners and the United States have it backwards. Discourse between government employees and policymakers on matters of public concern on which the employees work should be encouraged, not stifled. Eliminating First Amendment protection for job-related speech of government employees on matters of public concern would hamper government decisionmaking, for it would tend to chill the candor in communications between government employees and policymakers that enhances the formulation of policy.

[3] The importance to government decisionmaking of open discourse in the public workplace is manifested in the exemption in the Freedom of Information Act ("FOIA") for communications that are made as part of the government's "deliberative process." 5 U.S.C. § 552(b)(5). *See Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). As this Court has observed, FOIA's deliberative process exemption "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news. . . ." *Id.* at 8-9. The purpose of the exemption, therefore, is "to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." *Id.* at 9 (internal quotations omitted).

Under the proposed exception, the government could direct an employee to say what he thinks about a policy matter on which the employee is working, but then turn around and (unshackled by the First Amendment) discipline, demote, or discharge the employee if the government does not like what he actually has to say on the matter. With this double-edged sword hanging over their heads – "it is your job to give us your views, but you could lose your job if we disagree with your views" – government employees might be prone to pull their punches. They would be converted from purveyors of frank assessments about matters of public concern into a cadre of yes-men who tailor their views on such matters to fit what they believe their superiors want to hear, instead of saying what they believe their superiors should hear. *Cf. Wieman v. Updegraff*, 344 U.S. 183, 193 (1952) (Black, J., concurring) (loyalty oath requirements for government employees "have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven"). This is not a recipe for wise policymaking.

The following illustration underscores the problem. Suppose a government employee is charged with surveying the vulnerability of the nation's mass transit systems to a terrorist attack and conveying his views on the subject to higher-ups at his agency. Based on his substantive expertise, the employee concludes that the mass transit systems are at risk, and that concrete steps need to be taken to address the security gap. The employee is contemplating preparing a memorandum communicating his concerns to his superiors. But the employee is aware that the agency head has touted his ability to safeguard the

country's mass transit systems, and has made this the centerpiece of a public relations campaign to reassure Americans that travel on subways and buses is safe. If the proposed exception to the First Amendment for "job-related" speech were the law, the employee might be reluctant to contradict his boss and deliver a message that is out of sync with the message the agency is transmitting, for fear of losing his job. The gun-shy employee could downplay the nature of the security problem that he identified, or whitewash it completely. In that event, nobody would gain. Not the employee, who felt compelled to hold his fire. Not the government, which was deprived of significant (and potentially life-saving) information when formulating policy. And certainly not the people in whose name the government acts. Everyone would be better off if the employee simply called it as he saw it. With the First Amendment as a bulwark behind him, the employee would be more inclined to do just that, instead of shading what he regards as the truth.[4]

This Court has recognized that guaranteeing government employees the right to speak on matters of public concern is in line with the First Amendment's special protections for speech about, and participation in, political affairs – protections that enable all of us, if we so choose, to play a role in the American system of self-government. *See Connick,* 461 U.S. at 145. A government employee is no less a participant in the system of self-government when

[4] The United States claims that if the constitutional guarantee is withdrawn, federal and state statutes adequately will protect government employees who suffer retaliation on account of their job-related speech. U.S. Br. at 25, 27. As amicus Government Accountability Project shows in its brief, however, this patchwork of legislation is no substitute for the uniform baseline of the First Amendment.

he speaks on matters of public concern as part of his job duties than when he speaks on such matters when the workday is done. In both instances, the employee is commenting on public policy, and seeking to shape it.

In the end, stripping away all constitutional protection for the job-related speech of government employees would do violence to an animating principle behind the Court's steadfast insistence that government employees do not shed their First Amendment rights when the government hires them: "speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Connick*, 461 U.S. at 145 (internal quotations omitted). The job-related speech of government employees on public issues has a rightful place in that hierarchy, and the Court should keep it there.[5]

[5] To be sure, the government as employer has more latitude to restrict expression on matters of public concern than does the government as sovereign. For that reason, many familiar First Amendment maxims do not apply with full force in the public workplace. *See Waters*, 511 U.S. at 671-72 (plurality opinion). But while speech on matters of public concern can be limited inside the public workplace in ways that it cannot be on the outside, the government's interest in imposing such limitations in the name of preserving the orderly operation of the public workplace must be balanced against the interest of government employees in expression. *Pickering*, 391 U.S. at 568. The proposed exception for job-related speech would upset that balance – the government's interest always would trump the employee's interest, no matter the strength of the government's interest in a given case. As the Respondent shows in his brief, the government's interest in ensuring that the job-related speech of government employees on matters of public concern does not disrupt the functioning of the public workplace readily can be accommodated within the existing constitutional framework. For example, the government's interest typically would prevail over the employee's interest in job-related speech if the speech contradicts a lawful directive from the employer. Similarly, a spokesperson for a government agency normally would have no First

(Continued on following page)

B. Eliminating First Amendment Protection For Job-Related Speech Of Government Employees Would Discount The Personal Stake That Government Employees Have In Speech On Policy Matters On Which They Work By Wrongly Treating Such Expression As Speech Of The Government.

The Petitioners and the United States argue that government employees have no First Amendment rights in their job-related speech because they lack a personal interest in such speech, which (the argument continues) is really the speech of the government itself, not the employees.' Pet. Br. at 32-33; U.S. Br. at 19-20. This argument is incorrect.

Returning to some of our earlier illustrations, when the scientist at the FDA examines a new pharmaceutical and makes a recommendation on whether it should be marketed, he is expressing his personal view on the matter, not the FDA's. When the urban planner at the municipal land use agency evaluates the impact of a large-scale development project and makes a recommendation on whether the project should go forward, he is expressing his personal view on the matter, not the city's. And here in this case, when Richard Ceballos investigated allegations that a law enforcement officer had lied in an affidavit used to obtain a search warrant that led to a prosecution, and then made a recommendation that the prosecution be dismissed, he was expressing his personal view on the matter, not Los Angeles County's. In each of these instances, the government employees have a personal stake

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Amendment right to announce a view on a policy matter that is at odds with the view that has been established by the agency. *See infra* page 17.

in what they said on the job, because what they said was inherently personal. Of course, the employees are compensated by the government to communicate their views. But the fact that they receive a government paycheck does not depersonalize this speech and transform it into government speech in which the employees have no interest.

The notion that government employees lack a personal stake in their job-related speech is not supported by *Rust v. Sullivan*, 500 U.S. 173 (1991), and the Court's other "government speech" precedents. *Rust* involved a federal program that subsidized clinics to advise patients on family planning. In establishing the program, Congress made the policy judgment that abortion was not an appropriate method of family planning, and so it barred doctors participating in the program from discussing abortion with their patients. *Id.* at 179-80. Implementing Congress' determination, federal regulations precluded recipients of program funds from "provid[ing] counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning." *Id.* at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1988)). The Court rejected a First Amendment challenge to the restriction on abortion counseling and referrals, holding that the government had not impermissibly discriminated against the speech of persons who advocate abortion as a method of family planning, but had simply chosen not "to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194-95.

As the Court subsequently explained, the speech of the recipients of the federal funds in *Rust* was tantamount to the speech of the government because the government

was subsidizing clinics to transmit the government's message on family planning practices, not the clinic's message on such practices. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995); *cf. Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055, 2061-62 (2005) (First Amendment does not preclude the government from compelling citizens to subsidize a government message the government seeks to transmit). But neither *Rust* nor the subsequent decisions interpreting it stand for Petitioners' bald proposition that all "government-funded speech is equivalent to 'governmental speech.'" Pet. Br. at 33.

For example, in *Rosenberger*, the Court distinguished *Rust* and held that the First Amendment prevented a public university from imposing viewpoint-based restrictions on student expression that was funded by the university. The Court said that whereas the purpose of the subsidies in *Rust* was to promote the communication of the government's views, the purpose of the subsidies in *Rosenberger* was to promote the communication of the student-recipients' views. 515 U.S. at 833. *See also Velazquez*, 531 U.S. at 542 (purpose of funds provided to lawyers under legal services program was "to facilitate private speech, not to promote a governmental message"). The Court stressed that, in cases such as *Rust*, where "the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger*, 515 U.S. at 833. In *Rust* itself, those steps entailed the prohibition on recipients of federal funds from conveying a message on abortion

that was not in tune with the message the government sought to convey.

In sum, under the Court's government speech cases, a government employee loses a personal stake in his job-related speech on a matter of public concern, and such speech becomes the government's speech, only when the government pays the employee to communicate the government's view on that matter. When that is the case, the government can restrict the job-related speech of government employees on matters of public concern if the speech is at odds with a particular policy, message, or idea the government is trying to communicate. Conflicts of that sort arise, for example, when a spokesperson for a government agency issues a public statement that is inconsistent with the position that the agency head has adopted; when a government lawyer makes a legal argument in a brief or in court that is inconsistent with the argument his client and/or superiors have directed him to make; or when a senior appointee in a federal department or agency announces a policy decision that is inconsistent with the position of the President.[6]

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[6] Under the Court's "patronage" rulings, a senior appointee who conveys a policy view that conflicts with the President's policy view can be disciplined for that speech, and the First Amendment would not stand in the way. Such appointees serve at the pleasure of the President; and given the high positions they hold in the executive branch, their communications on policy are so intertwined with the President's that they may lack a personal interest in their job-related speech on policy matters. *See Waters*, 511 U.S. at 672 (plurality opinion); *Branti v. Finkel*, 445 U.S. 507, 518 (1980); *see also Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) (vesting of constitutional power in President to execute the laws necessitates that he have broad authority to remove high-level subordinates from office).

Applying the teachings of the Court's government speech precedents here, Richard Ceballos' memorandum calling to his superiors' attention a tainted prosecution was not the government's speech. Ceballos was neither a spokesperson for the District Attorney's office nor a final decisionmaker as to whether the prosecution should be dismissed. More fundamentally, the District Attorney's office did not pay Ceballos to transmit a particular message of the County's. To the contrary, as a supervising attorney with responsibilities to recommend which prosecutions to bring and which not to bring, Ceballos was paid to communicate his own views on that subject; thus, he had a personal stake in the speech.[7]

[7] The Court's expressive association precedents also betray the assertion that the job-related speech of a government employee on a matter of public concern is invariably government speech in which the employee has no personal stake. Under those precedents, First Amendment rights of expressive association are infringed when private organizations are required to admit members whose presence would dilute a message that the group seeks to communicate. For example, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court held that forcing the Boy Scouts to accept a gay scoutmaster violated the group's right of expressive association, because (as the Court saw it) his inclusion would impede the group's ability to communicate its view on the impropriety of homosexuality. *Id.* at 651. By contrast, in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the Court held that requiring a civic organization to accept women in its ranks did not infringe the organization's right of expressive association because in excluding women, the group had never intended to transmit any particular message about the role of women in society. *Id.* at 627. Looking at this case through the prism of the Court's expressive association precedents, it is analogous to *Roberts v. U.S. Jaycees*, not *Boy Scouts of America v. Dale*. Ceballos' memorandum did not interfere with any message that the County was trying to convey about police misconduct. In fact, the views conveyed in the memorandum were consistent with the County's view that police misconduct will not be tolerated. Pet. App. 20-21.

C. Eliminating First Amendment Protection For Job-Related Speech Of Government Employees Would Have Particularly Adverse Consequences In The Law Enforcement Setting, Where Candor Of Police And Prosecutors Is Imperative To The Truth-Seeking Function Of The Criminal Process.

Time and again, this Court has recognized that, at bottom, the criminal process involves a search for the truth. *See United States v. Mezzanatto*, 513 U.S. 196, 204 (1995); *United States v. Leon*, 468 U.S. 897, 907 (1984). The government's goal in a criminal proceeding, therefore, is not to win the case, but to see that justice is done. *See Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995); *see also Brady v. Maryland*, 373 U.S. 83, 88 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

Frank assessments by police and prosecutors on the strength of cases their agencies seek to bring is a key component of the criminal justice system's search for truth. Simply put, law enforcement officers must be able to stand up and raise questions when their agencies initiate what they consider to be a dubious criminal proceeding. First Amendment protection for such job-related speech of police and prosecutors bolsters workplace candor at law enforcement agencies, and thereby reinforces the truth-seeking function of the criminal process.

Needless to say, police misconduct, such as fabricating evidence, undermines the quest for truth in the criminal process. Not surprisingly, therefore, it is a staple of contemporary best police practices that officers should communicate to superiors instances of misconduct of fellow

officers. *See* U.S. Department of Justice, *Principles of Promoting Police Integrity: Examples of Promising Police Practices and Policies* 1 (2001) ("[L]aw enforcement officers should be required to report misconduct by other officers that they witness or which they become aware.").

By encouraging police officers to come forward and speak about misconduct in the ranks, law enforcement agencies strive to overcome the so-called "code of silence," which posits that "an officer does not provide adverse information against a fellow officer." Report of the Independent Commission on the Los Angeles Police Department 168 (1991) [hereinafter "Christopher Commission Report"]. *See also* U.S. Department of Justice, *Police Integrity: Public Service With Honor* 48 (1997) (law enforcement agencies should be "intolerant of the 'code of silence' [and] should work to establish a culture that promotes openness, ensures internal and external fairness, promotes and rewards ethical behavior, and establishes a foundation that calls for mandating the highest quality service to the public"). The code of silence is a deeply-ingrained and pernicious informal loyalty oath among police officers that corrupts the truth-seeking function of the criminal process. Law enforcement agencies need every tool at their disposal to eradicate it. The First Amendment is one such weapon. Eliminating constitutional protection for the job-related speech of government employees will make it that much harder to root out the code of silence in law enforcement agencies, and accordingly, would hinder the search for truth.

Open discourse is just as important in prosecutors' offices as it is in police departments. This Court has long acknowledged the prosecutor's "special role . . . in the search for truth in criminal trials." *Strickler v. Greene*, 527

U.S. 263, 281 (1999). The prosecutor may act "with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also United States v. Kattar*, 840 F.2d 118, 127 (1st Cir. 1988) (prosecutor's responsibility "is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible"); ABA Model Code of Professional Responsibility, EC 7-13 ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."). Among the ways that a prosecutor fulfills this responsibility is when she carefully evaluates a case, determines that it lacks merit and should not proceed, and conveys that conclusion to her superiors. Eliminating First Amendment protection for job-related speech of government employees would tend to discourage a prosecutor from making the blunt recommendation that a case be dismissed, particularly when it is a highly-publicized case on which her superiors have much riding. In such circumstances, the prosecutor is more likely to keep her views to herself and let the case proceed apace, rather than risk upsetting the apple cart and provoking the ire of higher-ups within her office.

Richard Ceballos' memorandum to his superiors concluding that police misconduct had sullied a prosecution highlights the connection between free expression in the law enforcement context and the truth-seeking function of the criminal justice system. As part of his job duties, Ceballos conducted a thorough investigation into

allegations that an officer had lied in an affidavit used to obtain a search warrant that led to a prosecution. J.A. 30-37. During his investigation, Ceballos discovered evidence that severely undercut the veracity of the affiant's statement, as well as statements of two other deputies on which the affiant purported to have relied. J.A. 36-37. None of the deputies reported anything amiss about the evidence contained in the affidavit. They apparently had vouched for each other, until they were challenged by Ceballos. J.A. 495-503.

It is highly significant that Ceballos conducted his investigation and submitted his memorandum against the backdrop of the "Rampart" police corruption scandal that had eroded public trust in law enforcement in Southern California. At the time that Ceballos spoke up, it had only recently come to light that an anti-gang unit assigned to the Rampart division of the Los Angeles Police Department ("LAPD") had, for several years, committed a staggering array of abuses, including planting evidence, framing citizens for crimes they did not commit, beating suspects, stealing money and drugs, filing false police reports, and obstructing justice. *See* Scott Glover & Matt Lait, *Ex-Officer Calls Corruption a Chronic Cancer*, LA Times, Sept. 21, 1999, at A1. *See generally* Report of the Rampart Independent Review Panel, *available at* http://www.lacity.org/oig.

The gross misconduct of the officers involved in the Rampart scandal distorted the truth-seeking function of the criminal justice system. Unfortunately, their egregious behavior was tightly sealed from scrutiny by the code of silence: police officers simply refused to report the misdeeds of their fellow officers. *See id.* at 70; Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's*

Board of Inquiry Report on the Rampart Scandal, 34 Loy L.A. L. Rev. 545, 558 (2001).[8]

The Rampart scandal also cast a spotlight on the Los Angeles County District Attorney's office, which prosecuted persons framed by the officers implicated in the Rampart scandal. *See* Report of the Rampart Independent Review Panel, at 280-82. Ultimately, more than 100 criminal convictions obtained by the District Attorney's office were overturned because the evidence supporting them had been fabricated by the lawless Rampart officers. Scott Glover & Matt Lait, *LAPD Settling Abuse Scandal*,

[8] Nearly a decade before the Rampart scandal broke, Southern California had been rocked by police misconduct when LAPD officers were caught on videotape beating a criminal suspect, Rodney King. An independent panel, the Christopher Commission, was established in the wake of the King beating to study the LAPD's practices. Among other things, the Christopher Commission admonished that the code of silence had concealed police abuses down through the years, and that the LAPD no longer could allow it to "be used as a shield to hide misconduct." Christopher Commission Report at 170. To that end, the Christopher Commission recommended that the LAPD "make enforcement of its policy against the code of silence a high priority in discipline, training, and other areas. In doing so, it should actively and severely discipline those who violate Department policy by failing truthfully to report known instances of misconduct." *Id.* at 177.

Notwithstanding the recommendation of the Christopher Commission, the code of silence survived. Indeed, the Rampart scandal revealed its virulence within the LAPD. The scandal was exposed only because one of the ringleaders finally was caught in the act of one of his crimes, and, in exchange for leniency, revealed to prosecutors the extent of the lawlessness in which he and his accomplices had been engaged. *See* Glover & Lait, LA Times, Sept. 21, 1999, at A1. The scandal led to a federal investigation of the practices of the LAPD. Ultimately, the LAPD entered into a consent decree with the federal government, which, among other things, requires officers to breach the code of silence and "report to the LAPD without delay" misconduct of fellow officers. *United States v. City of Los Angeles*, Consent Decree, ¶ 78, at 30, *available at* http://www.lapdonline.org/pdf_files/boi/final_consent_decree.pdf.

LA Times, March 31, 2005, at A1. As set forth in a report prepared for the Los Angeles Police Protective League (an organization that represents the interests of LAPD officers), the District Attorney's office may have inadvertently facilitated the Rampart scandal by routinely declining to confront suspected police wrongdoing and to scrutinize the credibility of officers who testify for the prosecution; tacitly encouraging officers to slant their testimony in favor of the prosecution; and generally failing to evaluate the real strength of cases before they were brought. *See Chemerinsky*, 34 Loy. L.A. L. Rev. at 634-36. The Police Protective League report rebuked the District Attorney's office in an additional important respect. It observed that "a key to preventing a recurrence of the Rampart incident is recognition of the failure of the District Attorney's office to request internal reports indicating police officers involved in their cases may have lied or mishandled their investigations. For years, there appears to have been a 'don't ask, don't tell policy' [in the District Attorney's office]." *Id.* at 636.

With news of the Rampart scandal percolating in the community that he served,[9] Richard Ceballos did not look the other way when allegations of police misconduct were called to his attention. Instead, he carried out his responsibilities as a prosecutor. He took the allegations seriously, investigated them, and, based on his investigation, recommended to his superiors that the prosecution should not go forward because, in his view, it was premised on inaccurate and misleading evidence supplied by law

[9] As the district court tersely put it, the "code word 'Rampart' says it all – there can be no doubt that, in Southern California, police misconduct is a matter of great political and social concern to the community." Pet. App. 62.

enforcement officers. In expressing that view, Ceballos honored the truth-seeking function of the criminal justice system. He did exactly what prosecutors are supposed to do. It would dishonor the truth-seeking function of the criminal justice system to conclude that because Ceballos did his job and spoke out within his workplace on a matter of public concern, he is not entitled to First Amendment protection.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL C. SMALL
AKIN GUMP STRAUSS HAUER & FELD L.L.P.
2029 Century Park East, Suite 2400
Los Angeles, California 90067
Telephone: 310-229-1000
Facsimile: 310-229-1001
Counsel of Record

JEFFREY L. FISHER
Co-Chair, NACDL Amicus Committee
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101

STEVEN R. SHAPIRO
ACLU FOUNDATION
125 Broad Street
New York, New York 10004

PETER ELIASBERG
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Blvd.
Los Angeles, California 90026

Attorneys for Amici Curiae

(16)

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Supreme Court of the United States

GIL GARCETTI, FRANK SUNDSTEDT, CAROL NAJERA AND COUNTY OF LOS ANGELES,
Petitioners,

v.

RICHARD CEBALLOS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS AND CALIFORNIA PROSECUTORS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JODY MANIER KRIS
Counsel of Record
CORA TUNG HAN
BRIDGETTE KAISER
CAREY BOLLINGER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

QUESTION PRESENTED

Does a prosecutor who speaks on a matter of public concern by reporting suspected police misconduct to his superiors lose his First Amendment protection against retaliation by his employer solely because he communicated his message while performing his job?

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INTEREST OF *AMICI CURIAE*[1]

The Association of Deputy District Attorneys is an independent employee organization comprised of Deputy District Attorneys employed by the District Attorney of the County of Los Angeles. The California Prosecutors Association promotes policies, candidates and initiatives on behalf of front line prosecutors in California. *Amici* have an interest in protecting the federal constitutional rights of their members, including the right to speak on matters of public concern without retaliation by their employers. Prosecutors are sometimes in a position to detect wrongdoing by law enforcement officers. *Amici* submit that when a prosecutor uses appropriate channels to air suspicions or evidence of perceived wrongdoing, pursuant to a reasonable, good-faith belief that such statements are required by law, his speech is protected by the First Amendment, so long as the interest in the speech is not outweighed by evidence of a legitimate need by the public employer to "promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service." *Connick* v. *Myers*, 461 U.S. 138, 150-151 (1983) (quotation omitted).

SUMMARY OF ARGUMENT

The decision below correctly applied this Court's First Amendment cases. Respondent appropriately asserted a cause of action based upon a violation of the First Amendment, as elucidated in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) and *Connick* v. *Myers*, 461 U.S. 138 (1983). Those cases establish that where, as here, a government employee speaks "as a citizen on matters of public concern" rather than "as an employee on matters only of personal in-

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, no attorney for any party has authored this brief in whole or in part. No person or entity, other than the *amici curiae*, their members and their counsel, has made any monetary contribution to the preparation or submission of the brief.

terest," *Connick*, 461 U.S. 147, the employee's speech receives protection, subject to a court's separate finding that such protection is not outweighed by a legitimate need of the government to regulate the integrity or operations of its workplace. Here, Respondent did not speak "as an employee on matters *only* of personal interest." In contrast—he reasonably concluded in good faith that ongoing prosecutions of criminal defendants were proceeding on the basis of false evidence and determined that the ethical duties that apply to him as a prosecutor licensed by the California bar required him to express this speech. He aired these conclusions using appropriate channels within his Office and in the courts.

Petitioners propose a *per se* rule—that any speech by a government employee that is performed in the course of discharging his job duties receives *no* First Amendment protection, even where the speech is on a matter of public concern, contributes meaningfully to the public debate of an issue concerning the integrity of the criminal justice system, and the government employer presented no evidence that could support a conclusion that the employee's speech was insubordinate, reflected incompetence, or otherwise compromised the integrity or operations of the office. This proposal is contrary to this Court's precedents. Moreover, the adoption of such a rule would naturally result in chilling of speech that is integral to the effective functioning of our justice system. It also would place a prosecutor on the horns of a dilemma when faced with a choice between taking actions in good faith to comply with ethical rules that, if found breached, could deprive him of his license and subjecting himself to demotion or loss of employment for discussing wrongdoing by one's law enforcement colleagues.

STATEMENT OF THE CASE

Richard Ceballos has been a Deputy District Attorney for the Office of the District Attorney in Los Angeles since 1989. JA 7. In late 1997 or early 1998, he was assigned to the Pomona branch office. JA 8. Approximately a year later, he was promoted to calendar deputy, a position of

prestige within the Office. JA 24. Calendar deputies oversee all of the cases handled by the Office in a particular judge's courtroom and supervise the trial deputies working there. JA 24-25. In that capacity, Ceballos reviewed any of the Office's cases coming in to that courtroom for arraignment,[2] made plea bargain offers, and attempted to settle the cases. JA 9. He also handled preliminary motions and discovery. *Id.* When it appeared that a case was not going to settle, he would assign it to one of the trial deputies who reported to him. *Id.*

Once a case was assigned, Ceballos would supervise the deputy handling it and assist him or her in preparation for trial, if necessary. JA 9. Beyond handling all of the cases in a courtroom, and representing the Office to a particular judge, the calendar deputy mentors the junior deputies he supervises, teaching them how to be good prosecutors. JA 25.

In February 2000, Ceballos was approached by Richard Escobedo, an attorney for one of the defendants in *People* v. *Cuskey*, a narcotics case that had been assigned to one of the deputies under Ceballos's supervision. JA 28-30. Escobedo said that he believed that one of the arresting deputy sheriffs lied in the affidavit he swore out to obtain a search warrant. JA 28. He wanted Ceballos to review the case, as a prosecutor with more experience than the trial deputy. *Id.* Ceballos agreed to look into the matter. JA 30.

After reading the file, reviewing the affidavit and the search warrant, and reviewing photographs and videotape of the search premises, Mr. Ceballos noticed an "obvious difference" between the property description in the warrant and the property as it appeared in the photos and video. JA 32. He then personally visited the property and spoke with the affiant. JA 34-35. Based on this review and personal investigation, Ceballos had serious reservations about the

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[2] Ceballos was not responsible for reviewing certain types of cases that were assigned to special units. JA 9.

veracity of the affidavit. JA 36.[3] Back at the office, he talked to his colleagues, showing them photographs and, in some cases, videotape. All of them agreed that the warrant was troublesome. JA 39. He showed videotape to his direct supervisor Carol Najera and to Head Deputy District Attorney Frank Sundstedt, and they too agreed with Ceballos that there was a problem with the warrant. *Id.*

Ceballos concluded that the search warrant had been supported by a false affidavit. Indeed, Ceballos believed, after interviewing the affiant, that the deputy sheriff had committed perjury. JA 112. He looked to see if there was "any other possibility to justify the search warrant under any other exception," but he concluded that there was no way to proceed on the case without the warrant. JA 48. Ceballos understood that prosecutors are bound by "ethical constraints" (JA 53) that require prosecutors to make an "independent decision as to whether or not to go forward with [a] case" (JA 47). He concluded that the case had to be dismissed, and he set forth this recommendation in a memorandum to Sundstedt. JA 40, 495-502. The memorandum was intended to serve as disposition report that would explain the reason for the dismissal of the case, if the case were dismissed. JA 41.

Sundstedt was "extremely concerned" with the import of Mr. Ceballos's observations in the memorandum (JA 112), but he asked Ceballos to make the memorandum less accusatory in tone because he planned to send it to the Sheriff's Department to explain why the case was going to be dis-

[3] The search warrant claimed probable cause to believe a stolen vehicle had been driven off the defendant's property, by representing the existence of "tire tracks" appearing to match those on the stolen vehicle along a "long driveway" leading to defendant's house. JA 498. The "driveway" was, in fact, a residential street housing nine residences in addition to defendant's. JA 499. The road was constructed of a combination of materials that did not appear conducive to maintaining discernable tire tracks along its complete distance—a fact that Ceballos himself tested by driving his SUV on the road. JA 500.

missed. JA 41. Ceballos made all of the requested changes.[4] Sundstedt signed off on the March 2, 2000 Memorandum and had it faxed to the Sheriff's Department. JA 43. The Captain of the Sheriff's Department demanded a meeting with the Office prior to the dismissal of the case. JA 27. Sundstedt agreed to a meeting, but communicated his view that there was "a problem with this case." JA 113, 182.

Ceballos advised Sundstedt that one of the *Cuskey* defendants was in custody following entry of a guilty plea. JA 44, 496. Sundstedt took the extraordinary step of authorizing Ceballos to obtain the convicted defendant's release from County Jail pending the meeting with the Sheriff's Department. *Id.* At the hearing concerning the release, Ceballos explained to defense counsel what he was doing and why (JA 54), specifically that he had recommended dismissal of the case based on his investigation of the site and discussions with Petitioners, but that dismissal would not occur prior to a meeting with the Sheriff's Department.[5]

At the ensuing meeting with the Sheriff's Department, Ceballos was verbally attacked by the Department's representatives. One of the lieutenants complained to Sundstedt and Najera that Ceballos was "not a prosecutor" and was

[4] Sundstedt made handwritten changes on Ceballos's original memorandum. This initial draft was destroyed after Ceballos had made the requested edits. JA 42.

[5] Ceballos's sworn testimony concerning his disclosures to defense counsel occurred at pages 114-117 of his deposition, in the portion represented by ellipses on page 54 of the Joint Appendix. Ceballos explained to Escobedo that "after going to the locations, after doing the research, after speaking with the detective, and after meeting and conferring with ... Najera and ... Sundstedt, that we were going to dismiss the case." Later, when the decision had been made not to dismiss the case, Ceballos advised Escobedo of this fact, but did not tell him anything else, including anything about his March 2 Memorandum. *Id.* at 117.

This testimony contradicts the unsupported assertion of *amicus* National Association of Counties that Ceballos "communicat[ed] protected work product to defense counsel." Nat'l Ass'n of Counties Br. 26. *Amici* will lodge these pages of the deposition if the Court so requests.

"acting more like a public defender" and requested that Ceballos be taken off of the case. JA 45. The captain said he wanted *Cuskey* to go forward because he was afraid the indicted defendant would file a lawsuit against the department. JA 49. At the meeting, the affiant was not questioned about the veracity of his statements and provided no information that caused Ceballos to revisit his conclusion that the information in the affidavit was false. JA 48-49. Nonetheless, Sundstedt indicated at the conclusion of the meeting that the Office would not dismiss the case prior to the hearing on the search warrant, but would allow the issue to be decided by the judge. JA 50-51, 183.

Ceballos informed Najera before the hearing on defendant's motion challenging the search warrant that he believed that the March 2, 2000 Memorandum and a subsequent memorandum should be disclosed to defense counsel pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963). JA 55. Najera instructed him to prepare a new memorandum instead that contained only the statements of the detective who had prepared the affidavit, omitting all other information, including the *facts* Mr. Ceballos learned as a result of his investigation of the record and the site. *Id.* Ceballos responded that he believed the appropriate action would be to disclose the memoranda, with redactions to protect the District Attorney's work product. JA 56. He felt that creating a new memorandum would be misleading because defense counsel would never "have had any idea that there was other information that was contained in the original memos or that there was even original memos" and informed Najera that he did not believe the creation of a new memorandum was ethical. *Id.* Najera consulted with others in the office and ultimately approved provision of the redacted memoranda to defense counsel. JA 419.

Ceballos was subpoenaed in his individual capacity by defense counsel to appear at the motion on the search warrant. JA 53. According to Ceballos, Najera made a veiled threat that he would face retaliation if he testified truthfully that, in his opinion, the sheriff's deputies had lied. JA 57-58.

Mr. Ceballos testified at the hearing (JA 158), although the trial court sustained several relevance objections raised by respondent Najera (JA 296-300).

Not long after these events, Ceballos was demoted from the position of calendar deputy and transferred to an inconvenient branch of the office, after he refused a further demotion to handle misdemeanors in the Pomona Branch. JA 185-186. One of his murder cases was reassigned to a prosecutor who had no murder trial experience and he was not assigned any further murder cases. JA 186-187.

ARGUMENT

I. CEBALLOS'S MEMORANDUM WAS CITIZEN-SPEECH THAT ADDRESSED A MATTER OF GRAVE PUBLIC CONCERN

A. Perjured Police Testimony Is Of Intrinsic Interest To The Public

Under the First Amendment, public employees have the right to engage in speech "on matters of public concern" without fear of retaliation by their employers. *Connick* v. *Myers*, 461 U.S. 138, 145 (1983). To determine whether speech is related to a matter of public concern, the Court looks to the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-148. Here, Ceballos's communication addressed possible police perjury, an issue of obvious interest to the public. This Court has noted that exposure of possible misuse of government power is critical to the functioning of a democracy. *New York Times Co.* v. *United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring, joined by Douglas, J.). The speech at issue in this case involves matters in which the public has intense interest.

The district court acknowledged "the intrinsic and important public interest in excluding perjured evidence from court proceedings," but held that the "mere significance" of the issue did not establish that Ceballos's memorandum setting forth the facts on which he based his conclusion that the affidavit contained falsehoods addressed an issue of public concern for First Amendment purposes because Ceballos

"wrote it as part of his job." Pet. App. 62. The court appeared to acknowledge that this result might be surprising to the people of Southern California, where "police misconduct is a matter of great political and social concern to the community" in light of the then-recent police scandal, known as "Rampart," in Los Angeles. *Id.*

Rampart was one of the worst police scandals in American history. *Report of the Rampart Independent Review Panel*, Executive Summary 1 (Nov. 16, 2000), *available at* http://www.lacity.org/oig/rirprpt.pdf ("Rampart Independent Review Panel Report"). The exposure of widespread criminal activity by Rampart officers occurred a mere six months before Ceballos's involvement in *Cuskey*. A detailed understanding of the scandal and the environment in which it occurred is essential to appreciate the degree to which this issue was at the forefront of public debate in Los Angeles in early 2000, to understand the obstacles that prosecutors face in exposing such misconduct, and to comprehend the dramatic realization by prosecutors of the consequences that could ensue if they are not vigilant in pro-actively monitoring the veracity of evidence offered by law enforcement personnel.

In the mid-1980s, in response to an increase in violent gang-related street crime and drug trafficking in the Rampart neighborhood, the Los Angeles Police Department ("LAPD") formed and deployed a branch of its anti-gang unit there. This unit, called "Community Resources Against Street Hoodlums," or "CRASH," operated with wide latitude and "developed an independent subculture . . . where the ends justified the means. [The Rampart CRASH officers] resisted supervision and control and ignored LAPD's procedures and policies." *Id.* As a result of this "independent subculture" and inadequate leadership and supervision, police officers in the Rampart CRASH unit committed numerous incidents of perjury, evidence-planting, theft, beatings and brutality, and drug-dealing.[6] As the Independent Review Panel noted, these acts, and the organizational gaps from which they arose, "severely impacted the credibility of the entire criminal justice system in Los Angeles." *Id.* at 2.

Three separate criminal events in the late 1990s involving Rampart CRASH officers led to the LAPD's investigation of Rampart CRASH and the ultimate formation of the LAPD Rampart Task force.[7] First, in November 1997, Rampart CRASH officer David Mack robbed a bank. Second, in February 1998, three LAPD officers in the Rampart CRASH unit detained a man and demanded information relating to gang activity. When the man refused to cooperate, the officers beat and choked him until he vomited blood. The officers attempted to cover-up the incident but were implicated when the victim checked into a hospital and conveyed the story while being treated.

Third, and most significant, in March 1998, the LAPD Property Division discovered the theft of three kilograms of cocaine from the LAPD Property room. Suspicion for the theft soon focused on Rampart CRASH officer Rafael Perez, who had close personal connections to David Mack. An investigation revealed that Perez had checked out three kilograms of cocaine under the name of another officer. In August 1998, the District Attorney brought charges against Perez for this theft. It was soon discovered that Perez had stolen more than eight pounds of cocaine from the LAPD and that he was involved in the sale or distribution of this cocaine. Ultimately, Perez pleaded guilty to the drug

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[6] Rafael Perez, an officer whose acts and revelations were central to the Rampart Scandal, has further alleged that police officers shot and killed unarmed suspects. *Id.* at 5.

[7] *LAPD Board of Inquiry into the Rampart Area Corruption Incident* (Mar. 1, 2000), at 1-3, *available at* http://www.lapdonline.org/pdf_files/pc/boi_pub.pdf ("LAPD Board of Inquiry Report"); *see also* Peter J. Boyer, *Bad Cops: Rafael Perez's Testimony on Police Misconduct Ignited the Biggest Scandal in the History of the L.A.P.D. Is It the Real Story?*, The New Yorker, May 21, 2001, at 60.

charges, confessed to shooting an unarmed suspect and planting a gun on him, and agreed to expose other secrets and "dirty" cops in the Rampart division in exchange for a reduced term on the drug charges and immunity for the shooting of the suspect. LAPD Board of Inquiry Report 4; *see also* Boyer, *supra* n.7

The information conveyed by Rafael Perez led to the discovery of extensive corruption and criminality throughout the Rampart CRASH unit. The officers "routinely and unnecessarily . . . beat suspects in an effort to intimidate the gangs that the officers were charged with policing." Stanley A. Goldman, *Running From Rampart*, 34 Loy. L.A. L. Rev. 777, 783 n.22 (2001). Many suspects were the victims of "plants," where guns or drugs were planted upon them in order to cover-up police brutality and murder. Officers then committed perjury, resulting in convictions (often, guilty pleas) on the basis of phony evidence.[8] Ultimately, more than 100 defendants had their convictions overturned because of alleged criminal conduct on the part of the LAPD. Matt Lait and Scott Glover, *The Rampart Scandal*, L.A. Times, Aug. 11, 2003, at 1. At least eight officers were convicted of crimes arising out of their activities in the Rampart CRASH unit. *Id.* Ultimately, the U.S. Department of Justice entered into a consent decree with the LAPD, requiring extensive reforms. Scott Glover and Matt Lait, *LAPD Settling Abuse Scandal*, L.A. Times, Mar. 31, 2005, at A1.

Much of the investigative work necessary to unearth the truth behind police misconduct in Rampart was done by a deputy district attorney named Richard Rosenthal.

[8] As just one example, two Rampart CRASH officers were involved in three cases where they claimed suspects spit drugs out of their mouths while being apprehended. In all three cases, DNA evidence conclusively excluded this possibility, indicating that this pair had an established practice of planting phony evidence and perjuring themselves at trial. *See* Gary C. Williams, *Incubating Monsters?: Prosecutorial Responsibility for the Rampart Scandal*, 34 Loy. L.A. L. Rev. 829, 830 (2001) (citing Matt Lait and Scott Glover, *DNA Evidence in 4 Drug Cases Refutes Officers*, L.A. Times, Apr. 26, 2001, at A1).

Rosenthal prosecuted Perez in his initial trial and was involved in securing Perez's confessions. Without Rosenthal's persistence and willingness to speak out about this misconduct, the Rampart scandal may never have come to light. Rosenthal faced documented obstacles in doing so: once the scope of his investigation broadened beyond Perez himself to the entire LAPD, Rosenthal noticed that the LAPD "wanted this scandal over and they would do anything they could to make it end." Lait and Glover, *The Rampart Scandal*, *supra*. Investigators were met with a "code of silence," and evidence suggested that the LAPD purposefully understaffed the investigations into its own members. *Id.* Understandably, prosecutors have since reported that they are "afraid of being blackballed or labeled by officers and superiors who challenge their assessments." *See* Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L.A. L. Rev. 545, 638 (2001) ("Chemerinsky Report").[9]

Petitioners' *amicus* assures the Court that if job-related speech by public employees is not protected, the "potential loss of contributions to the public debate . . . is at best minimal." Int'l Municipal Lawyers Ass'n Br. 13. But the findings from the Rampart investigation demonstrate that the potential loss is enormous. Foreclosing federal constitu-

[9] Another then-contemporaneous incident in Los Angeles bears mentioning. Evan Freed, a city attorney, suspected that testimony by police officers relating to a defendant's possession of a gun at the scene of a crime was phony. Upon visiting the crime scene, Freed noted that the officers could not possibly have seen a gun in the defendant's hand from their position at the scene. After reporting his conclusions to the court, the judge dismissed the charges and suggested that the District Attorney's Office notify the LAPD of the perjury. Freed was later fired. For a more detailed account of this incident, *see* Matt Lait and Scott Glover, *Two from LAPD Indicted in Alleged Framing of Suspect; Police: Pair Face Federal Charges They Falsely Claimed Man Had a Gun. Case is not Connected to Rampart Scandal but Could Affect U.S. Inquiry into Rights Abuses*, L.A. Times, Apr. 6, 2000, at A1; Williams, *supra* n.8, at 834.

tional protection for prosecutors who voice suspicions of misconduct would materially increase the disincentive to investigate possible misconduct that is already present in the law enforcement culture. Prosecutors who develop suspicions of misconduct will understand that the Constitution would offer *no* protection from termination or demotion if an ensuing investigation resulted in a disagreement with superiors about whether misconduct occurred or should be disclosed. Moreover, if such a disagreement were to ripen, the prosecutor could be placed in the untenable position of either ignoring his good faith belief that ethics laws required him to take action or by taking that action at his peril. Under these circumstances, the lack of constitutional protection would surely, even if subconsciously, affect the willingness of prosecutors to examine critically their suspicions. Prosecutors wishing to remain safe in their jobs would avoid any "knowledge" of misconduct that they would be ethically required to disclose if suspicions were confirmed, simply by burying their heads in the sand. Given that prosecutors are relatively more likely than the general public to develop legitimate suspicions given their repeated exposure to the work of the law enforcement investigators and access to all the evidence in a record of a particular case or set of cases, it is in the public interest that they be able to propose investigation of—and, where necessary, expose—official misconduct without fear of retaliation. *See* Pet. App. 12 ("The right of public employees to speak freely on matters of public concern is important to the orderly functioning of the democratic process, because public employees ... are positioned uniquely to contribute to the debate on matters of public concern." (internal quotations omitted)).

It is not sufficient to say, as do the United States and the International Municipal Lawyers Association, that public employees who suspect misconduct in the course of performing their jobs will not be deterred from investigating or reporting it due to the existence of anti-retaliation laws passed in the states. First, states are free to withdraw such laws altogether, circumscribe coverage of certain classes of employees, or limit relief to particular types of retaliation.

Moreover, by revoking First Amendment protection *per se*, state employees would be relegated to obtaining redress from state agencies or courts that sometimes lack detachment from, or are even directly beholden to, the very public employers that are engaged in the alleged retaliation.

B. Ceballos Spoke "As A Citizen Upon A Matter Of Public Concern"

In *Connick*, the Court contrasted speech "as a citizen upon matters of public concern," which is presumptively protected, with speech "as an employee upon matters *only* of personal interest," which is not. 461 U.S. at 147 (emphasis added). Accordingly, the cases focus initially on whether the speech at issue arises out of, or is motivated by, purely personal matters, such as personnel grievances or personal animus. In those instances, no presumptive protection is afforded and employers need make no showing that their interest as an employer outweighs the employee's interest in speech. Here, Petitioners do not claim that Ceballos sought to further a personal interest, nor do they contend that Ceballos's speech arose out of or reflected a general personnel grievance with his superiors. It is undisputed that his purpose was to expose wrongdoing by law enforcement officers. Pet. App. 10.

When the speech is not purely personal, presumptive constitutional protection turns on whether it involves speech "as a citizen upon matters of public concern." *Connick*, 461 U.S. at 147. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement ...." *Id.* at 147-148. Public employees may speak as citizens upon matters of public concern by "speak[ing] out freely" in a public setting on questions for which "free and open debate is vital to informed decisionmaking," *Pickering*, 391 U.S. at 571-572, or by privately communicating issues "of general concern" about the workplace. *Connick*, 461 U.S. at 148 n.8 (discussing *Givhan* v. *Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)).

As discussed above, the content of Ceballos's speech concerned potential police perjury, a matter of inherent public concern. As to context and form, Ceballos properly reported his concerns to his superiors and sought direction concerning the content and form of disclosures about such misconduct that should be presented outside the Office.

According to Petitioners, however, Ceballos's speech was not protected because it was not "citizen" speech. Petitioners further reason that it was not citizen speech because it was instead "employee" speech. *See* Pet. Br. 24.[10] This supposed dichotomy between "citizen" speech and "employee" speech has not been drawn in this Court's previous cases and should be rejected because it cannot meaningfully be applied in many contexts.

Petitioners' mechanical division between citizen speech on the one hand and employee speech on the other is arbitrary and unadministrable for two principal reasons. First, individuals can speak simultaneously as employees and as citizens. Second, Petitioners' *per se* rule does not account for speech that is not uttered in response to particular job duties, but rather arises from a desire to comply with legal obligations that exist separate and apart from one's job duties.

As the United States acknowledges, citizen speech may be "related or unrelated to the employee's job" and "communicated in or out of the workplace." U.S. Br. 18. Once it has been determined that the speech in question is not purely personal and does not further a mere personnel grievance, Petitioners' focus on "job duties" does little to elucidate whether or not the speech is uttered as a citizen. The Ninth Circuit rightly observed that "many public employees *do* have a personal stake in ensuring that events surrounding their employment comport with the public interest .... For such employees, promoting the public good

[10] Petitioners refer to employee speech as, alternatively, speech "engaged in during the normal course and scope of employment, in accordance with the normal duties of employment" (*id.* at 27) and "purely routine, job-required speech" (*id.* at 25).

is a deeply personal mission." Pet. App. 13 n.5. Ceballos presented evidence that he was motivated by such concerns.[11] When employees report wrongdoing to their superiors or otherwise, they speak as civic-minded individuals and also on behalf of the public. Their speech should therefore be protected as "citizen" speech.

In addition, when public employees are subject to legal or ethical rules, they have an individual interest in complying with those laws or rules. Lawyers in general, and prosecutors in particular, are subject to many such requirements. For example, most state bar licensing regimes, including California's, prohibit lawyers from engaging in dishonest activity and presenting false testimony. *See, e.g.*, Cal. Bus. & Prof. Code § 6068 ("It is the duty of any attorney ... (d) to employ ... those means only as are consistent with the truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of factor or law."); *id.* § 6128(a) (misdemeanor if attorney consents to deceit or collusion, with intent to deceive court or any party); Rules of Prof. Conduct of the State Bar of Cal. 5-200 ("In presenting a matter to a tribunal, a member: (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth ...."), *available at* http://calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158. This includes a responsibility to disclose any concealed facts that would make testimony otherwise misleading. *In the Matter of Jeffers*, 3 Cal. State Bar Ct. Rptr. 211, 220 (1994) ("It is settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline." (internal quota-

[11] For example, after Najera threatened Ceballos with retaliation if he testified truthfully, he decided that he must still do so, no matter what the consequences might be for him personally. JA 59. At his deposition, Ceballos explained that he felt that Najera and Sundstedt should have explained to the Sheriff's Department that his only motivation in challenging the affidavit was to be ethical. JA 53.

tions omitted)). Moreover, the Rules of Professional Conduct provide that:

> A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

Rules of Prof. Conduct of the State Bar of Cal. 5-110, *available at* http://calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158.

In addition to these state ethical rules are special obligations of prosecutors imposed by the federal Constitution. As this Court noted in *Berger* v. *United States*, 295 U.S. 78, 88 (1935), the prosecutor's "interest, therefore, in a criminal prosecution is not that [the government] shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer." *See also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 695-696 (1987). *Brady* v. *Maryland*, 373 U.S. 83 (1963), elucidates one component of those special obligations—requiring disclosure of exculpatory evidence known by the government to the defense.[12] Courts rightly hold that exculpatory evidence, wherever it might be located or known within a prosecutor's office, must be disclosed to

[12] The California Penal Code likewise provides that "[t]he prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies ... (e) Any exculpatory evidence." Cal. Penal Code § 1054.1.

the defense; in essence, holding the office as a whole responsible for compliance. But this collective responsibility does not obviate the individual duty of a prosecutor who knows of exculpatory information subject to *Brady* to disclose that information where the office has not otherwise done so, whether for innocent or malevolent reasons.[13] Indeed, this individual responsibility is confirmed by the District Attorney's Office Protocols as enacted following the issuance of the Rampart Report that advise that "[c]omplying with *Brady* is the *individual responsibility of each deputy*." Special Directive 02-08 (Dec. 7, 2002), *available at* http://da.co.la.ca.us/sd02-08.htm (emphasis added).[14]

Prosecutors like other lawyers, will usually desire personally to comply with their professional and legal obligations as individuals, independently of any request from their supervisors. Moreover, violations of the state's professional conduct rules carry sanctions that are imposed on the licensed attorney personally—not on the office for which he or

[13] *See, e.g.*, Model Rules of Prof. Conduct § 5.2 ("Responsibilities of a Subordinate Lawyer"), cmt. 1 ("a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor"), cmt. 2 ("If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it."), *available at* http://www.abanet.org/cpr/mrpc/rule_5_2.html.

[14] This is not to say that an individual prosecutor has the unfettered authority to disobey orders *not* to disclose information based on a determination by his superiors that such information does not constitute exculpatory information under *Brady*. If the matter were one on which reasonable minds could differ, the subordinate attorney might not receive First Amendment protection in the event he disclosed information contrary to orders on the ground that his actions intruded upon the public employer's right to manage the government's position in litigation. On the other hand, if the *Brady* duty were ambiguous, and the prosecutor in good faith felt a need to obtain assurance that he had satisfied his own ethical duties, he ought to be able to speak with the protection of the First Amendment. To assure that protection, he would need to make the disclosure in a manner that would minimize office disruption (by, for instance, obtaining a confidential advisory opinion from the state bar, or submitting a request to the Court *in camera*, or otherwise seeking permission for his disclosures to the defense or court before making them).

she works. Cal. Bus. & Prof. Code § 6077 (authorizing sanction of public or private reproval or suspension from practice for willful breach of Rules of Professional Conduct); *id.* § 6128 (offense punishable by imprisonment in county jail not exceeding six months and/or fine of not more than $2500). Judge O'Scannlain, therefore, was wrong to conclude that "Ceballos had no *personal* stake (other than in doing his job well) . . . in the speech for which he now seeks protection." Pet. App. 42.

When prosecutors perceive, as Mr. Ceballos did, that these various ethical and constitutional obligations require them to raise concerns with supervisors, seek permission through appropriate channels to disclose certain information to the defense (which Ceballos obtained), or testify truthfully about facts learned or opinions held if subpoenaed in their individual capacity, they are not speaking on behalf of the government.[15] They are speaking on behalf of the public they have been entrusted to protect and on behalf of themselves, as professionally licensed attorneys who have taken an oath to uphold the State Bar Code and other applicable public laws. Prosecutors' speech should therefore be treated as "citizen" speech when they investigate or report misconduct in good faith, pursuant to an objectively reasonable belief that the constitution, state or federal laws, or ethical rules require them to do so.

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[15] One *amicus* argues that Ceballos was mistaken in his belief that *Brady* required disclosure. Nat'l Ass'n of Counties Br. 15 n.8. Whether disclosure was, in fact, required by *Brady* is not before the Court. Moreover, it is not germane to whether Respondent was speaking as a citizen on a matter of public concern, where he indisputably had a reasonable, good faith belief (supported by the views of others in his office who agreed with production of the redacted memorandum to the defense) that *Brady* required such disclosure. Indeed, even the district court that granted summary judgment to Petitioners did not question the *Brady* obligation, noting that *Brady* obligations can be triggered based on memoranda prepared by the government concerning the integrity of a witness. Pet. App. 64.

Petitioners' focus on job duties has historically been, and is more appropriately, considered under the part of the constitutional balancing test that evaluates the employer's interest in managing the workplace when an employee's speech on a matter of public concern intrudes on the effective functioning of the agency. When a court could determine as a matter of law that the employee's speech on matters of public concern impeded the effective performance of the employee's or others' job duties, by reflecting incompetent job performance or insubordination, or otherwise undermining workplace relationships that depend upon special trust, the employer is free to discipline the employee for such speech without running afoul of the First Amendment. *Amici* do not here support a constitutional rule that would prevent public employers from disciplining prosecutors who deliberately or recklessly make unfounded allegations of misconduct or who disregard office policies and procedures (when such policies are in place) for handling client confidences and resolving inter-office disputes. Nor do they suggest that prosecutors who offer interpretations of *Brady* or other ethical responsibilities that are objectively unreasonable so as to rise to the level of incompetent performance are insulated from recrimination. These cases will undoubtedly be resolved in favor of the employer as a matter of law before the employer is required to stand trial. Indeed, such matters could likely be resolved in a summary judgment motion presented on the basis of employer affidavits, before plaintiff's discovery has run its course.

Petitioners' *per se* rule, on the other hand, will necessarily exclude from constitutional protection certain speech of high public value and low workplace intrusion. For instance, the rule offers no protection to line prosecutors who disclose to a Court that their supervisors had instructed them not to disclose DNA evidence excluding the possibility that a defendant committed the crime. Or to prosecutors who blow the whistle when they are instructed to dismiss a case be-

cause the defendant is the Mayor's son.[16] Or to a second chair prosecutor who reveals a private admission by the lead prosecutor that he struck every single African American juror from the panel not for the race-neutral reasons he offered to the court, but because "Black people won't convict." Each of these examples would involve speech rendered pursuant to the prosecutor's job duties—but undoubtedly involve a matter of public concern. Governments' attempts to silence legitimate debate about such matters cannot be countenanced under the First Amendment.[17]

[16] This is a variant of the facts presented in *Connick*, involving a questionnaire inquiring whether the office exerted political pressure on prosecutors. There, the Court held that the speech was on a matter of public concern, but was outweighed by the office disruption caused in light of the defendant's motives. What if Myers instead had complained that in a particular case she was prosecuting, her supervisors brought improper political pressure to bear? Petitioners' rule would give that speech *less* protection (because it directly arose out of her prosecution of a case) by relieving the employer of any burden of showing that the speech disrupted the workplace. That makes no sense.

[17] *Pickering* and *Connick* both provide that the employee's interest in free speech is balanced against "the interest of the State . . . in promoting the efficiency of the public services it performs." *Pickering*, 391 U.S. at 568; *see also Connick*, 391 U.S. at 154. The interest in "promoting the efficiency of the public services" may itself be *advanced* by early disclosure of government misconduct. The Rampart Scandal cost the City of Los Angeles more than $70 million in civil settlements alone. Andrew Blankstein, *Jury Awards $6.5 Million in Frame-Up: Public Defender for a Man Falsely Imprisoned and Shot by Rampart Officers Should Have Uncovered the Police Misconduct, Panel Finds*, L.A. Times, May 26, 2005, at B3. It further "undermined the credibility" of law enforcement authorities in Los Angeles with "dire consequences to effective law enforcement and the successful prosecution of crimes." Rampart Independent Review Panel Report 2. These incredible costs, which arose from institutional pathologies that had gone too-long uncovered, indicate that a well-functioning and transparent culture that promotes the prompt reporting of malfeasance may be a necessary tool for the promotion of government efficiency.

II. EVEN IF THE COURT INCORPORATES "ROUTINE JOB REQUIREMENTS" AS PART OF A FUNCTIONAL DEFINITION OF PRESUMPTIVELY PROTECTED SPEECH, IT SHOULD NOT ADOPT PETITIONERS' VERSION OF WHAT WAS REQUIRED OR ROUTINE IN THIS CASE

According to Petitioners, notwithstanding the public's interest in police misconduct, preparation of the memorandum was merely "routine, job-required speech" and therefore unprotected. Pet. Br. 31-32. In fact, Ceballos's speech was neither required by his job nor routine.

Admittedly, Ceballos undertook his investigation and reported his findings and recommendations to his superiors orally and in a memorandum pursuant to his duties as a prosecutor in the sense that the matters that he described arose out of a case under his supervision. But to construe job requirements for this purpose in a manner that sweeps in the performance of every discretionary function generally related to an employee's core job description, without pointing to specific assigned duties or instructions from supervisors would be overbroad. Writing reports about suspected police perjury was not an ordinary part of the duties of calendar deputies then or now. As a calendar deputy, Ceballos supervised (and handled certain aspects of) prosecutions of public offenses generally—in the *Cuskey* case, allegations of narcotics and weapons crimes. He did not operate as an inspector general and was not charged generally with investigating law enforcement officers or prosecuting cases of police misconduct.[18] Moreover, the proffer of testimony he

[18] For this reason, Cebalios's job duties were unlike those of the plaintiff in *Gonzales* v. *Chicago*, 239 F.3d 939 (7th Cir. 2001). In *Gonzales*, a police officer alleged that he was terminated in retaliation for reports he had written in his prior position as an investigator at the Office of Professional Standards. The Seventh Circuit held that these reports did not address a matter of public concern because they had been created in the scope of his ordinary job responsibilities.

Here, Ceballos's job was not to report on police misconduct. His situation is therefore similar to the plaintiff in *Delgado* v. *Jones*, 282 F.3d 511 (7th Cir. 2002), *cert. denied*, 125 S. Ct. 346 (2004). In *Delgado*, a police

would offer in response to a subpoena commanding him to appear in his individual capacity, or testimony actually offered pursuant to such subpoena, could not in any way be construed as speech pursuant to his job duties (particularly since he had by then been relieved of duty in supervising the case).

If investigating and exposing police misconduct were a regular part of a calendar deputy's job as defined by the District Attorney's Office, one would expect that it would have had related policies and procedures in place. In fact, the Office was specifically criticized after Rampart for its lack of policies regarding this very type of situation. *See* Chemerinsky Report, 34 Loy. L.A. L. Rev. at 633-634 (observing that prosecutors in Los Angeles "have no effective mechanism to report police perjury and misconduct" and recommending that the District Attorney's Office develop such policies).[19] The Office's Legal Policies Manual was likewise silent on the topic of police misconduct. *See generally* L.A. County Dist. Attorney's Office, Legal Policies Manual (1998).[20]

In November 2001 (after the events in this case), the District Attorney's Office released three written policies in response to the Rampart police scandal, including Special Directive 01-10 that for the first time provided guidance to prosecutors who become aware of police misconduct. *See* Special Directive 01-10 (Nov. 7, 2001), *available at*

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detective alleged that he was retaliated against for his investigation into alleged criminal activities involving a close relative of a public official. The Seventh Circuit held that the plaintiff stated a valid First Amendment claim even though his job was generally to arrest persons found to have broken the law. The court distinguished *Gonzales* by noting that the holding of that case was "limited to routine discharge of assigned functions, where there is no suggestion of public motivation." *Id.* at 519.

[19] At the time, the Office had no explicit policies defining prosecutors' *Brady* obligations either. Chemerinsky Report, 34 Loy. L.A. L. Rev. at 632-633.

[20] This outdated version of the Manual is not in the record or available on the District Attorney's current website. *Amici* will lodge this Manual with the Court should the Court so request.

http://da.co.la.ca.us/pdf/referrals.pdf.[21] The Office acknowledges on its web site that "[n]ever before in the 151-year history of the District Attorney's Office ha[d] that office issued written protocols which outline how, when and under what circumstances prosecutors will investigate allegations of criminal misconduct by law enforcement employees." *See* http://da.co.la.ca.us/restoring.htm. Thus, when Ceballos had to decide what to do about his suspicions in the *Cuskey* matter, he acted in a policy vacuum. According to Ceballos, even Sundstedt was unsure how to handle the situation and said that he had never come across this situation in his more than 25 years with the office. JA 80. Under these circumstances, the writing of the memorandum cannot fairly be described as an ordinary or routine part of Ceballos's job duties.

Petitioners also rely on the fact that prosecutors in Los Angeles County regularly complete "disposition reports" in support of the argument that Ceballos's memorandum was simply routine job-required speech. The district court likewise concluded that because prosecutors commonly prepare disposition reports, preparing a memorandum specifically about possibly perjured police testimony was "part of Ceballos's job." Pet. App. 63-64. However, as explained below, the memorandum was not an ordinary disposition report.

Deputy district attorneys do routinely fill out disposition report forms, after a decision has already been made by their superiors to dismiss a case because of, *inter alia*, acquittal by a jury or an adverse ruling by a judge at a sup-

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[21] Pursuant to Special Directive 01-10, deputy district attorneys who become aware of possible criminal misconduct by any member of the justice system during the pendency of a case are to "prepare a memorandum detailing information and/or evidence suggesting possible criminal misconduct." *Id.* The memorandum is to be forwarded through the Head Deputy or Deputy-in Charge to the Head Deputy of the Justice System Integrity Division ("JSID"). The "Head Deputy or Deputy-in-Charge shall also prepare a separate memorandum setting forth an analysis of the alleged misconduct" and then forward both memoranda to the JSID. *Id.*

pression hearing. Typically, a one-page form is used,[22] but sometimes a prosecutor will write a supplementary memorandum explaining his recommendation of a particular disposition. Only if the recommendation is accepted does it become the basis for the disposition of the case, and the memorandum then becomes part of the disposition report.[23]

That Ceballos wrote some kind of memorandum in connection with the *Cuskey* case was not unusual. However, the content of his recommendation, his request that the *Cuskey* case be dismissed on the basis of police dishonesty, was highly unusual. It was a request for an extraordinary disposition—not only did it recommend *sua sponte* dismissal by the District Attorney prior to resolution of a pending motion to traverse, it also recommended the vacatur of a sentence already imposed on a co-defendant *who had pled guilty*. JA 496. The Ninth Circuit observed that "a report that would ordinarily be considered routine by virtue of its form may well become non-routine by virtue of its content, such as when it contains serious charges of official wrongdoing." Pet. App. 17. That is what happened here. Typically the practice of the Los Angeles County District Attorney's Office has been that questions about the credibility of police have been left to judges (and juries) to decide. *See* Chemerinsky Report, 34 Loy. L.A. L. Rev. at 635 (finding "tension over whether it is part of the prosecutor's role to evaluate witness credibility, including that of police officers"). Here, Sundstedt wanted to proceed by allowing the hearing on the search warrant to go forward, leaving it to the judge to decide whether to suppress the evidence. Pet. App. 54. Ceballos disagreed because he felt that, as prosecutors, they had an obligation not to let the case go forward because the evidence had been seized illegally. JA 47 ("We have to make an independent decision as to whether or not to go forward with the case. We just don't throw cases in front of judges and juries just because. We're here for a purpose.").

[22] This form is Appendix A-1 to Chapter 6 of the Legal Policies Manual, *supra*, at 23 & n.20.

[23] *See* JA 41 ("The disposition report always must go to the head deputies because they have to sign off on it."). Ceballos intended the March 2, 2000 Memorandum to serve as the disposition report in the event that his recommendation to dismiss the case had been accepted. JA 40 ("It basically was the disposition report, or was going to be the disposition report for dismissing the case."). Because his recommendation was not adopted, the Memorandum did not become part of a disposition report.

Ceballos's recommendations that the case be dismissed without a hearing challenged entrenched institutional inertia within the Office concerning how to handle suspected police misconduct. His vigorous appeals to his supervisors and the Sheriff's Department to express his good faith belief that a defendant awaiting trial had been indicted on the basis of demonstrably false evidence were motivated by a concern with the public interest and did not disregard any office instruction or policy. This speech, which indisputably involved matters of public concern, prompted just the sort of private and public debate that one would want to occur—among prosecutors at various levels within the office, in a dialogue with the Sheriff's Department, and ultimately in an evidentiary hearing. Adopting the rule proposed by Petitioners in this case would make such healthy and important interchange significantly less likely to occur.

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

JODY MANIER KRIS
Counsel of Record
CORA TUNG HAN
BRIDGETTE KAISER
CAREY BOLLINGER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

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Supreme Court of the United States

GIL GARCETTI, *et al.*,
Petitioner,

v.

RICHARD CEBALLOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ROBERT H. CHANIN
JEREMIAH A. COLLINS
(Counsel of Record)
LAUREN J. MCGARITY
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-2600

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is submitted, with the consent of the parties,* on behalf of the National Education Association (NEA), a nationwide employee organization with more than 2.7 million members, the vast majority of whom are employed as teachers in public schools and colleges throughout the United States.

To teach is to communicate—often on matters of the greatest public importance and controversy. Consequently, the proposition advanced by Petitioners and their *amici*, under which a public employee's speech never can qualify for First Amendment protection if the employee engaged in the speech as part of his or her job duties, would have a devastating impact on teachers.

Consideration of the nature of public school teaching and of the interests of students, teachers, school officials and society at large in fostering "that free play of the spirit which all teachers ought especially to cultivate and practice," *Weiman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J. concurring), demonstrates that the rule advocated by Petitioners is analytically unsound and at war with basic First Amendment principles.

NEA therefore submits this brief to show that, for teachers and for public employees generally, the question whether job-related speech on a matter of importance to the public is protected against retaliatory employment action should continue to be governed by the balancing test laid out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), rather than by the absolute rule urged by Petitioners under which such retalia-

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* Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

tion would be permitted even in the absence of any legitimate governmental interest to support it.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Pickering*, 391 U.S. at 574, this Court held that "statements by public [employees] on matters of public concern must be accorded First Amendment protection." Subsequently, in *Connick v. Myers*, 461 U.S. 138, 147 (1983), this Court clarified that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," such speech is not protected by the First Amendment.

Petitioners argue that "a public employee's purely job-related speech, expressed strictly pursuant to the duties of employment," never can qualify for First Amendment protection, no matter how great may be the public importance of the subject matter. *See* Petitioners' Brief ("Pet. Br.") at i. Petitioners' attempt to find that rule in the language of *Connick* and subsequent decisions fails on its face, and we see no need to add to what Respondent will demonstrate in that regard.

Rather, we will address the three principal substantive contentions that are advanced by Petitioners and their *amici* in support of the rule they have proposed. Those contentions are, *first*, that a public employee's speech in the course of performing the functions of his or her job constitutes "government speech," Pet. Br. at 31, and does not entail any personal expression that could trigger First Amendment protection; *second*, that the interests of government as employer require an absolute rule that denies First Amendment protection to any and every instance of "job-related" speech; and *third*, that the rule advocated by Petitioners and their *amici* would comport with this Court's decisions concerning "the analogous issue of restrictions on government-funded speech," Brief for the United States ("U.S. Br.") at 19.

Focusing on the category of public employees that provides perhaps the clearest illustration of the flaws in those contentions—public school teachers—we will show, *first*, that speech by public employees in the course of performing their jobs that addresses issues of public concern often constitutes personal expression warranting First Amend-ment protection; *second*, that all legitimate interests of the government in restricting or punishing such speech in any particular instance are properly taken into account through the *Pickering* balancing test, such that no categorical rule is justified; and *third*, that this Court's decisions in the government-funding cases do *not* stand for the proposition that a recipient of funds has no First Amendment interest in speech, but only for the proposition that the recipient has no right to divert the funds to uses and purposes other than those for which the funds were provided.

Thus, speech by public employees in the course of performing their job functions that addresses issues of public concern is entitled to First Amendment protection unless, evaluated through the *Pickering* test, the First Amendment value of the speech is outweighed by legitimate governmental interests that are harmed by the speech.

ARGUMENT

I. SPEECH BY PUBLIC EMPLOYEES, INCLUDING IN PARTICULAR BY TEACHERS, ON MATTERS OF PUBLIC CONCERN, EVEN IF EXPRESSED IN THE COURSE OF AN EMPLOYEE'S PERFORMANCE OF JOB FUNCTIONS, INVOLVES PERSONAL EXPRESSION THAT IS ENTITLED TO FIRST AMENDMENT PROTECTION, UNLESS THE SPEECH IMPEDES THE PERFORMANCE OF THE EMPLOYEE'S DUTIES OR OTHERWISE INTERFERES WITH LEGITIMATE GOVERNMENTAL INTERESTS

It is common ground in this case that a public employer does not violate the First Amendment by punishing an employee for speech, even on a matter of public concern, if the employee's First Amendment interest in the speech is outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The matters to be taken into account in making that determination include such "pertinent considerations [as] whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

The question presented in this case is whether there is a class of speech—described by Petitioners as "purely job-related speech, expressed strictly pursuant to the duties of employment," Pet. Br. at i, and described in a variety of other

ways by Petitioners' *amici*,[1]—which is entitled to no First Amendment protection even if (as is the case here) the subject matter of the speech is of great public importance, and even if (as is also the case here) the employer has not identified any respect in which the speech adversely affected "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. at 568.

Petitioners argue that such a categorical denial of First Amendment protection is warranted because speech in which an employee engages in the course of performing his or her job duties necessarily constitutes "government speech," Pet. Br. at 31, lacking any element of personal expression.

If there are any circumstances in which that might be a fair and cogent characterization of the nature of a public employee's speech on a matter of public concern, this is not one of them. Here, as in many public employment contexts—of which public education provides a particularly good example—employees regularly advance their own ideas, and

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[1] The United States refers to "speech by a public employee that touches on a matter of public concern but is expressed strictly pursuant to the duties of employment," U.S. Br. at I, without mentioning Petitioners' additional qualification that the speech be "purely job-related." In contrast, the International Municipal Lawyers Association (IMLA) argues that all "job-related speech," not just "purely on-the-job speech," should be denied First Amendment protection. IMLA Br. at 4. The inability of Petitioners and their *amici* to agree on a clear definition of the category of speech they are seeking to exclude from First Amendment protection is itself an indication that their various positions lack any firm doctrinal basis. Because Petitioners' argument is principally focused on the situation in which a public employee's job requires the employee to engage in speech and the employee is punished for the content of the particular speech in which he or she thereby engaged, this brief likewise will focus on that situation, and will not address other contexts in which employee speech might be characterized as "job-related."

are expected to do so, in the course of performing their job functions.

A. As this Court explained in *Ambach v. Norwick*, 441 U.S. 68, 78 (1979):

> Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. . . . In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. *No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals* (emphasis added).

One need only reflect for a moment on the teaching of social studies, literature, philosophy, science and a host of other subjects to recognize that, in teaching a particular subject matter as well as in imparting values of citizenship to students, teachers function without a script, and must draw upon their own opinions as to what is important and what is true, whether it be with respect to the causes of the Civil War, the calls for impeachment of Presidents Andrew Johnson, Richard Nixon or Bill Clinton, the science of global warming, or the treatment of religion in Chaucer, Shakespeare or Milton.

To be sure, to the extent that school authorities make judgments regarding the curricula to be taught and the materials to be assigned to students, or regarding how particular controversial issues are to be addressed, teachers are required (with only very narrow exceptions) to conform to those decisions. *See infra* at 15 & n.4. But the fact of the matter is that school authorities frequently choose to make curricular decisions only at a level of broad generality, and call upon each

individual teacher to determine, within those broad outlines, what actually will be covered and assigned in class. So too, it is rare for school authorities to give teachers directives, or even guidance, as to what to say or not to say about a potentially controversial topic that might arise out of the subject matter of a course. Indeed, school authorities often have no view—much less any view that teachers are directed to follow—as to what is the right or wrong way to teach a particular controversial subject. Far from wanting teachers to read from a script, school authorities expect and desire that teachers will resolve such matters for themselves in the first instance. This leaves ample room for teachers to draw upon and express their own ideas and understandings as to matters of public concern. Indeed, school authorities *expect* a teacher to do this, as long as the teacher adheres to any established curricular requirements and exercises what the school authorities deem to be sound professional judgment.

It therefore would be the purest fiction to assert that a teacher who, in instructing a class, speaks on controversial matters of public concern, has no personal stake in what he or she is saying. Whatever may be the limits of a teacher's First Amendment rights in this regard, *see infra* at n.4, it is impossible to read what this Court has said about the First Amendment value of "that free play of the sprit which all teachers ought especially to cultivate and practice," *Weiman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring), and yet maintain that publicly employed teachers have no First Amendment interests in their teaching. *See Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("[I]n view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation."); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic

freedom, which is of transcendent value to all of us and not merely to the teachers concerned.").

B. Another area in which Petitioners' proposed distinction between "job-related speech" and "personal" speech is an artificial one is when teachers speak up to protect or promote the well-being of their students. Teachers—particularly the best teachers—acquire a genuine personal interest in their students' safety, and in the quality of the education their students receive. Teachers are not expected to sit silent when they become aware of matters that are harming their students. As this Court recently pointed out, "teachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are 'the only effective adversar[ies]' of discrimination in schools." *Jackson v. Birmingham Bd. of Educ.*, 125 S.Ct. 1497, 1508 (2005).

Speech by a teacher reporting instances of harm to students—including harm that may be attributable to school policies or programs—often does (and sometimes must) occur in the course of the teacher's performance of his or her regular job functions, but this does not alter the fact that, when speaking out in this context, a teacher is speaking *to* the government, not *as* the government, and (quite properly) is expressing his or her own views, not necessarily those of the government.[2] In sum, it defies reality to assert that when

[2] A good illustration of this point may be found in the Fourth Circuit's decision in *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004). Love-Lane, an African-American assistant principal at an elementary school, complained in a variety of forums about disciplinary policies and practices that disproportionately disadvantaged African-Americans. When her attempts to broach this subject with the school's principal were rebuffed, Love-Lane raised her concerns at faculty meetings and at meetings of a "School Improvement Team" comprised of administrators, teachers, and parents. Love-Lane subsequently received a negative evaluation from the principal, and was demoted to work at another school in a non-

teachers speak on matters of public concern in the course of performing their jobs they necessarily are speaking only as script-readers for the government. Rather, in situations such as the ones we have described (and the one presented in this case), an employee's speech on a matter of public concern has the same First Amendment value when expressed in the course of performing his or her job functions as it would have if expressed in another context. As the Sixth Circuit aptly put it in *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1052 n.5 (6th Cir. 2001), "the very nature of [a public school teacher's] profession entails that her speech on matters of

administrative position. She challenged these adverse actions as a violation of her First Amendment rights. The court found that Love-Lane's complaints about racial discrimination in the school's disciplinary practices addressed a matter of public concern, and that Love-Lane's broaching of these issues in discussions with her supervisors, at faculty meetings, and in the context of her role on the "School Improvement Team" did not remove her speech from the protections of the First Amendment. *Id.* at 777. Although it was part of Love-Lane's job to communicate with her supervisors, to attend faculty meetings, and to work on the "School Improvement Team," the Fourth Circuit properly did not view that fact as depriving Love-Lane of a protected First Amendment interest in speaking out in those forums to rectify racial discrimination in the educational system.

Similarly, courts have found public school teachers to have legitimate First Amendment interests in the content of their speech, however job-related, when they complain to supervisors about a lack of resources for a special education program, *see Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 514 (9th Cir. 2004), or when they report a colleague's inappropriate touching and sexual harassment of students to supervisors and include such reports in the colleague's regular annual evaluation, *see Cromley v. Board of Educ. of Lockport Township*, 699 F. Supp. 1283 (N.D. Ill. 1988). Such cases involve conduct that is clearly related to, and at least in part required by, the employee's job duties, but the courts properly have not viewed this as negating the protected First Amendment interest of the teachers in the messages they convey on such matters of public importance.

political and social interest is likely to be made both as an employee and as a citizen."

II. ALL LEGITIMATE INTERESTS OF A PUBLIC EMPLOYER WHICH MIGHT PROVIDE THE BASIS FOR TAKING ADVERSE ACTION AGAINST AN EMPLOYEE FOR SPEECH ON A MATTER OF PUBLIC CONCERN ARE TAKEN INTO ACCOUNT IN APPLYING THE *PICKERING* BALANCE, AND THERE IS NO JUSTIFICATION FOR THE CATEGORICAL RULE PROPOSED BY PETITIONERS, WHICH WOULD CHILL SPEECH THAT POSES NO THREAT TO ANY GOVERNMENTAL INTEREST

There unquestionably are instances in which speech by a public employee, even on a matter of great public importance, may be made the basis for adverse employment action because of the impact of the speech on legitimate governmental interests. It is the office of the *Pickering* balancing test to address that point by providing for a full and fair weighing of the public employer's proffered reasons for punishing employee speech, including specifically the employer's interest in workplace discipline and proper working relationships and in preventing speech that "impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388.

Petitioners and their *amici* offer no sound reason why, in instances when an employee's speech on a matter of public concern is expressed in the course of performing job functions, a proper "accommodat[ion of] the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment," *id.* at 384, cannot be achieved—as in other public employee First Amendment cases—through application of the *Pickering* balance, rather than through a categorical rule that denies

protection to the speech no matter what public importance the speech may have, and no matter how weak or non-existent may be the countervailing legitimate interests of the employer.

The absence of any persuasive reasoning on this point in the briefs of Petitioners and their *amici* is glaring. For example, the brief of *amicus* National School Boards Association ("NSBA") speaks of the need to punish speech by teachers "who refuse to execute their responsibilities in the manner prescribed by the school board," NSBA Br. at 3, who are not "willing to fulfill the mission of the public employer in the manner which the public employer prescribes," *id.* at 9, whose "speech reflects unwillingness to conform to the expectations of the employer," *id.* at 10, and who would "supplant[ ] a school's policy choices with the teacher's own," *id.* at 19. NSBA admits, however, that it is "likely" that the kinds of teacher speech it finds objectionable "would not be constitutionally protected under the balancing test described in *Pickering*." *Id.* at 20-21. Yet NSBA, like Petitioners and their other *amici*, argues for a rule that would allow public employers to punish not only the kinds of insubordinate speech described by NSBA, but also speech that is not shown to have been contrary to any rule, or even to any legitimate *interest*, of the employer.

Attempting to make that bitter pill go down more easily, NSBA writes as if the position Petitioners are urging would allow school authorities to take action against a teacher for speech only "so long as [the authorities'] actions are reasonably related to legitimate pedagogical concerns." *Id.* at 14-15, quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).[3] *See also* NSBA Br. at 15 (stating that school authorities should be allowed to impose "reasonable

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[3] Noting that *Hazelwood* involved student speech, NSBA states that "the same principles that govern a school's ability to control student speech would also apply to employee speech that might be seen to bear the imprimatur of the school." NSBA Br. at 15.

restrictions on the speech of . . . teachers") (*quoting Hazelwood,* 484 U.S. at 267, *and citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983)). Yet it cannot be gainsaid that the categorical rule proposed by Petitioners would allow punishment for speech even in the *absence* of any "legitimate pedagogical interest" or any "reasonable restriction."

To the extent that Petitioners and their *amici* even acknowledge the sweeping nature of the rule they propose and make any effort to justify the breadth of such a rule, their arguments boil down to two related contentions: (1) that a rule allowing punishment even of speech that does *not* disserve any legitimate governmental interest is justified as a means of making absolutely certain that there will never be a case in which a court (by erring in its application of the *Pickering* balancing test) might allow speech that *does* disserve governmental interests to escape punishment; and (2) that the courts should not be called upon to determine whether a particular instance of retaliation for employee speech is or is not justified by legitimate governmental interests because this entails litigation costs for public employers.

Those proffered justifications for throwing the First Amendment baby out with the bathwater ignore the grievous harm that would be caused to our democracy if, as Petitioners would have it, public employers were free to punish employees for speech on matters of public importance even where the employer cannot establish any legitimate basis for such punishment.

As this Court said in *Rankin*, in rejecting arguments that a Constable's office should not be required to justify the speech-based discharge of the plaintiff employee in that case:

> [T]he threat of dismissal from public employment is . . . a potent means of inhibiting speech. Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

483 U.S. at 384 (internal citation omitted).

In public education, the danger that a teacher may be subjected to retaliation for speech that did not in fact "hamper[ ] public functions," *id.*, arises not only where "*superiors* disagree with the content of employees' speech," *id.* (emphasis added), but also where members of the community put pressure on school authorities to punish a teacher for speech that the school authorities themselves do not necessarily believe to have been improper. As Judge Kaufman wisely wrote, because school authorities are subject to such community pressure, "[t]he dangers of unrestrained discretion are readily apparent. Under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail. It is in such a situation that the will of the transient majority can prove devastating to freedom of expression." *James v. Board of Educ. of Cent. Dist. No. 1*, 461 F.2d 566, 575 (2d Cir. 1972).

The list of reported cases in which public school authorities have caved in to pressure from vocal members of the community, where the authorities had no good faith reason to believe that a teacher's speech had in fact been objectionable, is dishearteningly long. To give but a few examples:

> —In *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985), *rev'd in part on other grounds,* 477 U.S. 299 (1986), a teacher was punished as a result of community uproar over his use of a life science curriculum *that the administration had approved.*
>
> —Similarly, in *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001), a teacher was fired when a community uproar developed over the visit of a controversial figure whom the teacher had invited to the school *with the explicit approval of the principal.*

—In *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001), a community college instructor presented a "lecture on language and social constructivism, where the students examined how language is used to marginalize minorities and other oppressed groups in society [, which] included a discussion and analysis of words that have historically served the interests of the dominant culture in which they arise." *Id.* at 674-75. Hardy "solicited from his students examples of such terms," and the students gave examples including the words "girl," "lady," "faggot," "nigger," and "bitch." *Id.* at 675. One student complained about the class to "a local civil-rights activist," *id.*, who—plainly having been misinformed as to the nature of the class discussion—met with the college president to say "that he would not allow our kids to come to an institution and be berated with the 'N' word and the 'B' word," *id.* After informing the instructor "that a 'prominent citizen' representing the interests of the African American community had become involved and had threatened to affect the school's already-declining enrollment," *id.*, the college terminated the instructor solely to placate the misinformed activist. *See id.* at 681, 682.

Not to belabor the obvious, the categorical rule proposed by Petitioners—which would deprive public school teachers of First Amendment protection even in "scapegoat" situations such as *Stachura, Cockrel* and *Hardy*—would give school authorities free rein to punish speech even in situations where that result cannot be supported by any sound constitutional analysis.

There is no need for this. No showing has been made that the *Pickering* balancing test is incapable of properly accommodating public employers' interests in cases of this kind. That test properly effectuates the right of public employers "to discipline workers whose speech interferes with the[ ] goals" of "maintain[ing] the efficiency as well as the integrity of [the] office." *Rankin*, 483 U.S. at 393 n. * (Powell, J., concurring).

To whatever extent the employer's interests may be stronger in a case of speech-in-the-course-of-job-functions than in other cases, the *Pickering* balancing test can take this into account. We fully agree with the United States' assessment that "it will ordinarily be more difficult for the employee to prevail at the second step of the *Pickering-Connick* inquiry when the speech is expressed in the course of the employee's duties," and that when "an employer can show that, in saying or writing the things at issue, the employee was performing his duties inadequately or inappropriately, that showing should be sufficient to defeat the constitutional claim." U.S. Br. at 28-29. But that simply goes to show that the *Pickering* balance will produce proper results in this as in other contexts.[4] It is *not*

[4] Thus, for example, if a teacher neglects parts of the required curriculum because he or she devotes excessive class time to discussing social issues of importance to the teacher, *Pickering* will defeat a First Amendment claim. *See Scallett v. Rosenblum*, 911 F. Supp. 999, 1015-17 (W.D. Va. 1996) aff'd, 106 F.3d 391 (4th Cir. 1997) (table). In the same vein, although a teacher's decisions as to curriculum and teaching methods can involve matters of public concern warranting First Amendment protection, "no court has found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques *in contravention of school policy or dictates*." *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (emphasis added). This not to say that school officials have unlimited authority to dictate teachers' speech. "[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom," *Keyishian*, 385 U.S. at 603; and "no [Government] official, high or petty" may "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). We therefore agree with NSBA that this Court's decision in *Hazelwood*, although it addressed student speech rather than teacher speech, indicates that restrictions on teacher speech also must be "reasonably related to legitimate pedagogical concerns." *See supra* at 11 & n.3. But, except in the very rare case, these principles will mean that a teacher who fails to conform to pedagogical judgments of the school authorities—the kind of teacher described in NSBA's brief—will not be able to prevail on a First Amendment claim because the *Pickering* balance would defeat the claim.

an argument for *dispensing with* the *Pickering* balance and adopting a categorical no-protection rule.

An interpretation of the First Amendment that permits educators to be fired for speech related to a matter of public concern even where the speech is consistent with legitimate pedagogical goals and school policies and is in no way disruptive of the educational process would have a severe chilling effect on the willingness of teachers to discuss current events or controversial issues in the classroom. As this Court has recognized, when expression of controversial ideas may subject a teacher to punishment, teachers will be compelled to "stay as far as possible from utterances or acts which might jeopardize [their] living." *Keyshian*, 385 U.S. at 601. A rule excluding from First Amendment protection all speech that is expressed in the performance of job functions would place teachers—particularly non-tenured teachers—in an extremely vulnerable position. In order to protect their jobs, such teachers would be inclined to avoid any methodological innovation or enrichment of the prescribed curriculum, and any discussion of controversial topics or current events. To take a timely example, it is difficult to conceive of a classroom discussion of the causes of the current conflict in Iraq that would not offend the sensibilities of at least one parent or community member. If Petitioners' proposed rule were the law, a teacher concerned about his or her long-term employment prospects would be well-served to avoid such a topic altogether, despite its significant educational value. Similarly, such teachers would be discouraged from reporting mistreatment of students, for fear that their speech might subject them to retaliation by a disapproving administration.

No constituents of the public educational system—neither students, nor teachers, nor school officials, nor the community—would benefit from such a chilling effect on teachers. "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free

mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

III. THIS COURT'S DECISIONS CONCERNING GOVERNMENTALLY-FUNDED SPEECH DO NOT SUPPORT PETITIONERS' POSITION

Petitioners and the United States attempt to find support for their position in the line of cases, exemplified by *Rust v. Sullivan*, 500 U.S. 173 (1991), in which this Court has considered the First Amendment rights of recipients of governmental funding. *See* Pet. Br. at 32-34; U.S. Br. at 19-21. To the extent that the issue in such cases is "analogous," U.S. Br. at 19, this Court's decisions do not lend any support to the position Petitioners and their *amici* are advocating here.

In *Rust*, the Court held that, where the Federal Government had provided funds to subsidize family planning services that will lead to conception and childbirth, and had declined to allow the use of the funds to promote or encourage abortion, clinics and doctors who received the funds had no First Amendment right to use the funds to provide abortion counseling and referral. Because the government could constitutionally "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds," 500 U.S. at 192-93, quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977), the fact that speech was involved did not give recipients of the funds a First Amendment right to use the funds for a purpose outside of—and indeed contrary to—the purpose for which the government had made the funds available. *See also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("when the government appropriates public funds to promote a particular policy of its own," the government may "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee").

In the context of public employment, the principle that is analogous to the holding in *Rust* is that public employees do not have a First Amendment right to engage in speech in the course of performing their job duties *that is at odds with the employer's legitimate decision as to what message should be conveyed*. As we have explained, the *Pickering* balance embodies that very principle. *See supra* at 15 and n.4. But, nothing in *Rust* or *Rosenberger* suggests that an individual who is using government funds when he speaks has, for that reason, no First Amendment rights even when engaged in speech that is *not* outside of, or contrary to, the bounds that have legitimately been set by the government.[5] Hence, the government-funding cases do not support the kind of categorical rule that is proposed by Petitioners and their *amici*.

CONCLUSION

There is, quite simply, no basis and no need for a categorical rule excluding teachers and other public employees from the protections of the First Amendment while performing their job functions. The government's interests in the effective job performance of public employees and the efficient performance of governmental operations is adequately protected by the appropriately nuanced inquiry of the *Pickering* balancing test. In contrast, to suppress public employee speech on a matter of public concern in the absence of any legitimate interest justifying such suppression, merely because the speech took place in the course of the employee's

[5] Indeed, *Rust* indicates that even the limited degree of control over government-funded speech approved by the Court in that case would not necessarily be supportable in every context, including some educational contexts. *See Rust*, 500 U.S. at 200 (*citing Keyishian*, 385 U.S. at 603, 605-06). *Cf. Polk County v. Dodson*, 454 U.S. 312, 322 (1981) (recognizing that public defenders are employed with the assumption that they will be "free of state control").

performance of job functions, would be inimical to basic First Amendment principles.

Respectfully submitted

ROBERT H. CHANIN
JEREMIAH A. COLLINS
(Counsel of Record)
LAUREN J. MCGARITY
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-2600

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GIL GARCETTI, *et al.*,

Petitioners,

v.

RICHARD CEBALLOS,

Respondent.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* GOVERNMENT ACCOUNTABILITY PROJECT, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENT

JOANNE ROYCE*
THOMAS M. DEVINE
GOVERNMENT ACCOUNTABILITY PROJECT
1612 K Street, NW,
Suite 1100
Washington, D.C. 20006
(202) 408-0034

**Counsel of Record for the Amici Curiae*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are organizations each with a long history of occupational free speech advocacy. *Amici* are dedicated to the concept that "a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters." *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

The Government Accountability Project (GAP) is a non-partisan, non-profit public interest law firm specializing in legal advocacy on behalf of "whistleblowers" – government and corporate employees who expose illegality, gross waste and mismanagement; abuse of authority; substantial or specific public health and safety dangers; or other institutional misconduct undermining the public interest.

GAP's efforts on behalf of federal whistleblowers, in particular, are based on the belief that a professional and dedicated civil service is essential to an effective democracy. Civil servants are the vital link between our government and the people it serves. They are the foundation to keep responsible government service a constant, regardless of variations in leadership or political party. GAP believes that to preserve not only the integrity and independence of the federal civil service, but also the responsiveness of federal institutions to the citizenry, conscientious employees who point out illegal or questionable practices

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[1] This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

must not be forced to choose between their jobs and their silence.

GAP has substantial expertise on protecting government employees' free speech rights. GAP attorneys have testified before Congress over the last two decades concerning the effectiveness of existing statutory protection, filed numerous *amicus curiae* briefs on constitutional and statutory issues relevant to whistleblowers, co-authored the model whistleblower protection law to implement the Inter-American Convention Against Corruption, and led legislative campaigns for a broad range of relevant federal laws, including the Whistleblower Protection Act of 1989, P.L. No. 101-12, 103 Stat. 16 (April 10, 1989) (WPA) and subsequent 1994 amendments, as well as the employee rights provisions in the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. GAP has published material concerning the WPA and its practical realities. *See, e.g.*, Thomas M. Devine, *The Whistleblower's Survival Guide: Courage Without Martyrdom* (1997); Thomas M. Devine *et al.*, *Whistleblowing Around the World: Law, Culture and Practice*, "Whistleblowing and the United States: The gap between vision and lessons learned" (2004); Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 Admin. L.R. 531 (1999); and Robert G. Vaughn, Thomas M. Devine & Keith Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 The Geo. Wash. Int'l L. Rev. 857 (2003).

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of

over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

The Association of Trial Lawyers of America (ATLA) is a voluntary national bar association of approximately 50,000 members practicing in every State. ATLA members primarily represent plaintiffs in personal injury, civil rights and employment discrimination cases. ATLA has long advocated legal protections for employees who step forward to expose wrongful or dangerous misconduct.

Amici agree that the contribution of whistleblowers to uncovering and rectifying grave problems facing society at large cannot be overstated. Whistleblowers are employees who take an ethical stand against wrongdoing. They often do so at great risk to their careers, financial stability, and personal and familial relationships. Frequently, whistleblowers are courageous people of integrity who have observed and documented fraud, gross violations of law or health-threatening safety and environmental hazards. *Amici* advocate that society protect and applaud whistleblowers, because they are saving lives, preserving our health and safety and preserving vital fiscal resources. *Amici* respectfully submit this brief to assist the Court in resolution of this case.

SUMMARY OF THE ARGUMENT

The case at bar will establish whether there is constitutional protection for public employees whose responsibilities require them to assume the risks of whistleblowers, often involuntarily, in order to carry out the duties of their positions. Petitioners would have the Court create a Catch-22, where a public servant must choose between legally abdicating his or her duty, or else being legally defenseless against harassment such as professional isolation or termination – the likely consequences if job-required speech is controversial or threatens politically powerful interests within or outside the government.

Protection for job-required speech is a prerequisite for the government to function effectively. It is deeply-ingrained that freedom of expression includes activities within the employment relationship, and job-required speech is where the First Amendment counts the most for the public dependent on the government to function responsibly. Government employees are the indispensable early warning system to catch problems before government service deteriorates, whether the consequences would be waste of taxpayer funds or unnecessary public health and safety threats. In the context of dissent, their role has been popularized as "whistleblowers." Under 5 U.S.C. § 2302(b)(8) for the federal civil service they are defined as employees who disclose information they reasonably believe is evidence of illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety. The stakes are even higher for those engaging in job-required speech not necessarily including dissent, but often requiring a

messenger to deliver unwelcome news or carry out unpopular assignments.

Normally, a First Amendment case requires the Court to balance the employee's rights as a citizen against the government's right to efficiently manage its institutions. Petitioners ask the Court to withdraw constitutional rights in a radically different, lose-lose scenario for both principles. If employees cannot defend themselves for communicating openly and honestly about politically unpopular assignments, the inevitable chilling effect would create a code of silence that replaces the free flow of information necessary for government managers to make informed, responsible judgments and oversee their implementation. The government cannot function efficiently in a structure that encourages public employees to be silent observers and that shields managers who "don't want to know." Ironically, canceling constitutional protection for mandatory intra-agency communications not only would dry up the flow of information internally but would exacerbate and maximize unnecessary public controversy, because that would be the only remaining safe context left for a public employee.

Petitioners ask the Court to overturn a longstanding doctrine highlighted by the *Bridges, Pickering, Givhan, Scrivener* and *Connick* decisions that shield speech necessary for public service. Contrary to Petitioner's sophistic distinction, the key factor behind this doctrine has been the subject matter and value of constitutionally-protected speech, not the identity or societal role of the speaker. Petitioner's dire warnings of paralyzed management and flooded courts already have failed the reality test. As demonstrated by the *Pickering* doctrine's history, the Court's case-by-case balancing test has developed adequate criteria for a

functional free speech boundary. Further, neither management nor the courts have been overburdened by the experience under environmental whistleblower statutes, where for decades corporate workers have had the right that Petitioners find so threatening.

There is, likewise, no basis to conclude constitutional protection is unnecessary due to the existence of federal, state and local whistleblower statutes. Their hit or miss coverage and drastically different track records of effectiveness have been characterized by inconsistent boundaries for protection with respect to the type of disclosure, subject matter, manner of disclosure and remedies. The federal whistleblower law excludes protection for speech to carry out assignments. Clearly, sporadic statutory coverage is no substitute for a minimum foundation of constitutional rights.

ARGUMENT

The case at bar crystallizes the quandary of the federal employee who, as part of his or her job duties, identifies governmental waste, fraud or illegality and suffers retaliation at the hands of a governmental authority for his duty to report. Here, Richard Ceballos, a deputy district attorney, reported in a disposition memorandum to his supervisors that an affidavit in support of a search warrant had been falsified. Pursuant to the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963), he also shared his determination with defense counsel in the underlying case. Subsequently he suffered retaliation as confirmed below for his disclosures within the chain of command and those made to defense counsel as required by law.

The dilemma faced by Respondent Ceballos – of having a duty to report wrongdoing, but having no commensurate protection from retaliation – is neither theoretical nor infrequent. Indeed, the duty to disclose is an increasingly common reality for government employees. To illustrate, every federal employee who witnesses fraud, waste or illegality is faced with the same predicament. The Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, § 2635.101(b)(11) provides as follows: "Employees shall disclose waste, fraud, abuse and corruption to appropriate authorities." On January 20, 2001, President Bush reiterated this obligation in a memorandum he issued to assure "the highest standards of integrity in Government." Memorandum from President George W. Bush to the Heads of Executive Departments and Agencies on Standards of Official Conduct (Jan. 20, 2001). Many state employees are similarly obligated as a part of their employment to report official malfeasance. *See, e.g.*, D.C. Code § 1-615.58(7) (2005) ("Each employee of the District government shall make all protected disclosures concerning any violation of law, rule, or regulation, contract, misuse of government resources or other disclosure enumerated in § 1-615.52(a)(6), as soon as the employee becomes aware of the violation or misuse of resources.").

To assert, as do Petitioners, that a federal employee may be constitutionally required to communicate certain *Brady* information but denied constitutional protection if that and associated disclosures within the chain of command engenders retaliation, well illustrates both the injustice and the illogic of denying First Amendment protection to speech expressed pursuant to job duties. It creates a Catch-22, where a public servant must choose

between illegally abdicating his or her duty and being legally defenseless against professional isolation or termination – the likely consequence if duty speech is controversial or threatens politically powerful interests within or outside the government.

I. FIRST AMENDMENT COVERAGE FOR JOB-REQUIRED SPEECH IS A NECESSITY FOR THE GOVERNMENT TO FUNCTION EFFECTIVELY.

A. Constitutional Protection of Speech Expressed Pursuant to Employment Duties is Essential for the First Amendment's Paramount Objectives.

One of the most eloquent formulations of First Amendment values was delivered by Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927):

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney, 274 U.S. at 375-76.

This Court has also established that unfettered speech concerning the manner in which government performs its

duties is a requisite element of the informed self-governance that the First Amendment seeks to protect:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Mills v. Alabama, 384 U.S. 214, 218-219 (1966).

It is well-established that freedom of expression includes speech in order to responsibly carry out job duties. As one commentator observed,

> The term ["expression" protected by the First Amendment] would also include communications made in the regular course of agency business, even a conversation between two employees of the agency on some minor matter pending for agency consideration. In other words, if the communication satisfies the other requirements for classification as "expression," the fact that it takes place within the employment relation does not take it out of the category of "expression." Any other view would, of course, render the First Amendment inapplicable except as to utterances made outside the course of agency business. But there is no reason to draw the line at such a point. Effective functioning of a system of freedom of expression requires, certainly so far as the government employee is concerned, protection made for statements made within the employment relation as well as outside it.

Thomas I. Emerson, *The System of Freedom of Expression* 566, 570-71 (1970).

In *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), this Court established the tests for application of that principle in a landmark decision that remains controlling: "the interests of the [employee] as a citizen, in commenting on matters of public concern" must be balanced against "the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees."

Beginning with *Pickering*, this Court recognized that the First Amendment should function as a bulwark against governmental tyranny for public employees as for any other citizen. "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick v. Myers*, 461 U.S. 138, 147 (1983). For public employees, no less than any other citizen, may be subjected to abusive governmental attempts to silence discourse on matters of public concern. Indeed, First Amendment protection of public employee complaints is compelled by the uniquely vulnerable status of the civil servant as "whistleblower." "[I]t is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574.

The *Pickering* doctrine recognizes not only the special vulnerability of the public employee but also the societal benefits of protecting employment-related speech. "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions. And a government employee, like any citizen, may have a strong,

legitimate interest in speaking out on public matters." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (citations omitted).

Since 1978, Congress has observed how whistleblowers ensure the values underlying the First Amendment:

> Often, the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistleblowers frequently encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants.

S. Rep. No. 95-969, at 8 (1978).

The most trenchant weapon against governmental abuse of authority is the whistleblowing employee whose speech identifies waste, illegality or corruption in governmental operations. Job-related speech by government employees is critical to maintaining the promise of the First Amendment. It is speech where it counts. And if that speech happens to be part of an employee's job duties, the

interests protected by the First Amendment are of even greater significance for the public who is dependent upon responsible government function.

This case will establish whether there is constitutional protection for government employees whose responsibilities require them to be, often involuntary, whistleblowers, in order to carry out their duties to the public. If, as this Court has held, a government employee who engages in discretionary speech on matters of public concern is vulnerable and deserving of constitutional protection, the public employee whose duty it is to speak on such matters is even more vulnerable. Likewise, if public employees are uniquely informed due to their government employment, the public employee's unique expertise peaks for speech that is a part of job duties. Finally, an employee suffering retaliation for speech pursuant to job duties has at least as legitimate an interest in speaking on public matters as does any other citizen.

B. Canceling Protection for Job-Required Speech Would Impair Government Efficiency, Because Clear Channels of Communication are a Prerequisite for the Government to Function Effectively.

Normally in assessing a First Amendment case, the court must decide which valid but conflicting interest will lose, balancing between an employee's rights and the government's interest in efficiency. Petitioners ask this court to withdraw constitutional rights in a radically different, lose-lose scenario for *both* employee rights and the government's management interest in efficiency. As

recognized above, rights for whistleblowing are a major step toward a more effective civil service.

Duty speech is far more significant. The government cannot function effectively under a code of silence. In 1978, a massive Senate Governmental Affairs Committee study, concluded, "The code of silence thwarts management's ability to effectively manage and actually removes the burden of accountability from their shoulders. Fear of reprisal renders intra-agency communications a sham, and compromises not only the employee, but also the Constitutional function of congressional oversight itself." *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. On Governmental Affairs*, 95th Cong., 2d Sess. 49 (1978).

In other words, it undermines government efficiency to have a structure that encourages a staff of "yes people" and that shields managers who "don't want to know." As the same Senate study also found,

> Agency heads who are not aware of potentially serious situations within their own organization obviously cannot take any measures to correct them. However, once informed of a problem, once provided with the existing facts pertaining to an allegation of wrongdoing, the agency head can decide what the appropriate response should be. He or she can, using existing authority, make decisions, resolve the problem and be held accountable for their actions. It is currently too easy for a serious problem to be excused within the bureaucracy because the "right" persons were not aware that it existed. . . .

> Agency policy makers must be made aware of and accountable for those problems that federal employees encounter in the course of their work. Safe, effective intra-agency communication is the prerequisite of responsible, efficient public service. Dissenting opinions and important information, however unpleasant, must be transmitted to government officials.

Id. at 3, 48.

In a chilling illustration of this principle, a major finding of the 9/11 Commission was that the breakdown in official communications increased America's vulnerability to terrorism. Report of the National Commission on Terrorist Attacks, 399-428 Government Printing Office (2004).

The principle is so fundamental that some statutes make it a prerequisite that an employee disclose misconduct allegations within the chain of command as a precondition for free speech rights outside the organization. Stephen M. Kohn, *Concepts and Procedures in Whistleblower Law* 383 (2001).

Canceling constitutional protection for duty speech would exacerbate the code of silence. There can be little uncertainty that when employees cannot defend themselves against retaliation, they are more likely to remain "silent observers" of misconduct they uncover in carrying out their job duties. Profiles in courage are the exception, not the rule. As this Court observed in *Pickering*, 391 U.S. at 574, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." In whatever context, public employees who criticize misconduct within their agencies are criticizing their employers. That creates

inherent discomfort. *Waters v. Peterson*, 495 F.2d 91, 98 (D.C. Cir. 1973). Employees throughout the government's public service mission logically could fear dismissal, demotion, retaliation or suspension in retaliation for speech necessary to perform their jobs properly – unless this Court recognizes First Amendment protection for duty speech, as well as for public debate.

The consequences are even more severe, however, for silencing duty speech compared to silencing dissent. Illegal government abdication can be even more threatening to public service than efficiency concerns. To illustrate, had Respondent Ceballos not made disclosures to his superiors and defendant's counsel, the integrity of the judicial system for that prosecution could have been fatally compromised. Coerced silence could thwart the public's right to know information essential for democratic legitimacy in government actions. The consequences could be disastrous for silencing mandatory reports of dangerous products such as contaminated meat and poultry, environmental spills, nuclear safety violations or defective military equipment. Taxpayers could be defrauded billions of dollars, if government auditors are silenced from performing their duties.

Ironically, while canceling constitutional protection for duty speech would increase internal silence, in some instances it could also increase public debate. Lack of safe, routine in-house channels would force government workers to make the same statements in extracurricular contexts in order to retain constitutional rights. Lack of safe internal channels will drive employees into public disclosures that create management inefficiency due to unnecessary, broad-based public conflicts. Forcing employees to take otherwise "job-required speech" out of the chain

of command in order to assure First Amendment protection would institutionalize the maximum disruptive effect for agencies. Managers would be far more likely not to receive notice of potential problems, allowing them to clean house before media and public exposure.

C. Per Se Exclusion of First Amendment Coverage for Job-Required Speech is Unworkable.

The facts of the case at bar further demonstrate why no per se rule should be established. Respondent Ceballos alleges that his speech involved more than strictly job duties – in addition to submitting his concerns about the falsified affidavit in the single disposition memorandum to his two supervisors and submitting *Brady* material to defense counsel, he also expressed his concerns to his colleagues in the District Attorney's office, to his supervisors (both orally and in writing), to the Deputy Sheriff who authored the affidavit, in a meeting with his supervisors and several representatives of the Sheriff's Department, and in a court hearing. Often, as here, an employee's speech may not be expressed strictly pursuant to his job duties or it may also contain speech completely unrelated to his job duties. In such cases, it is not practical or even possible to delineate which speech may have engendered retaliation. Consequently, this Court's observation in *Pickering* is as compelling today as it was then:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Pickering, 391 U.S. at 569.

II. CONSTITUTIONAL PROTECTION FOR JOB-REQUIRED SPEECH IS CONSISTENT WITH PAST SUPREME COURT PRECEDENT.

By quoting selective passages of this Court's precedent out of context, Petitioners posit that the availability of First Amendment protection turns upon whether the employee speaks "as a citizen." Petitioners argue that when an employee speaks pursuant to the responsibilities of public employment, he speaks, by definition, "as an employee," not "as a citizen" and is not therefore covered by the First Amendment. Petitioner's Brief at 23-25. Petitioners distort this Court's precedent since *Pickering*, and attempt to create a sophistic distinction. No authority is offered why a working person cannot be what he or she is in reality – both a citizen and an employee.

Even prior to *Pickering*, this Court recognized that public employees are "citizens" first and consequently do not altogether relinquish their First Amendment rights of citizenship. The language from *Pickering* and *Connick* quoted by Respondents to posit a critical "citizen speech" component of First Amendment application in fact only reflected the historical distinction as well as the more recent acknowledgement that public employees *are* citizens:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual

> circumstances, a federal court is not the appropriate forum in which to review the wisdom for a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. at 147.

The operative distinction in this language is whether the employee speaks on a matter of public concern, as opposed to a matter of only personal interest, and thereby becomes entitled to First Amendment protections within the framework of the *Pickering* balance. In *Waters*, this Court similarly emphasized the character of the speech, rather than the speaker:

> And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished.

Waters, 511 U.S. at 674.

This Court long has recognized the importance of free communications and duty speech for the government to function effectively in the context of litigation. In *N.L.R.B. v. Scrivener*, this Court explained that free speech rights for witnesses should be broadly construed so as "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." 405 U.S. 117, 122 (1972).

Indeed, petitioners propose to reverse a consistent pattern of evolving precedents that protection is necessary for communications by a public official whose duties include the subject matter of the communication. *Bridges v. California*, 314 U.S. 252, 277-78 (1941).

Similarly, lower courts long have respected the necessity for open communications within government channels. In *Burkett v. United States*, 402 F.2d 1002, 1008 (Ct. Cl. 1968), the Court of Claims noted "the importance of keeping open channels through which employees can call attention to alleged derelictions or injustices to the attention of their superiors." In *Hostrop v. Board of Jr. College School District No. 515*, 471 F.2d 488, 493 (7th Cir. 1972), the court noted that "[p]laintiff, as a public employee, was entitled to be protected from retaliation for actions which he had every reason to believe were a part of his assigned duties."

In *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), this Court's unanimous ruling ended any confusion whether the First Amendment applies to a government employee's internal speech. This Court's same reasoning applies to duty speech at issue in this case:

> The First Amendment forbids abridgement of the freedom of the speech. Neither the Amendment itself not our decision indicate that this freedom is to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to accept such a view of the First Amendment.

Givhan, 439 U.S. 415-16. As this Court emphasized in *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 176 n.10 (1976), "It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate [their] views to the very decisionmaking body charged by law with making the choices raised. . . ."

III. STATE AND FEDERAL STATUTES ARE AN INHERENTLY INADEQUATE SUBSTITUTE FOR CONSTITUTIONAL PROTECTION.

Petitioners and *amici* contend that statutory protections render constitutional rights unnecessary. Whistleblowers who have had to rely on those statutes would strenuously disagree. While 46 states and the District of Columbia have some form of statutory protection for public employees, "the effectiveness of whistleblower protection varies radically from jurisdiction to jurisdiction." Kohn, *supra*, at 378. As one commentator explained, "State whistleblowing statutes consist of a patchwork of provisions. While some provide fairly broad protection, others limit protection to a specific industry area. The state whistleblowing statutes also differ in the type of disclosure they protect, the manner of disclosure they require, and the remedies they provide." Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 Wash. L. Rev. 1029, 1047 (2004).

To illustrate the inconsistencies, in Mississippi public employees are protected, but only if they provide information to an investigative body or agency. Miss. Code Ann. § 43-47-37 (1999 & Supp. 2003). In Texas public employees are protected if they report a violation of law. Texas Gov't Code Ann. § 554.001-.010 (Vernon 1994 and Supp. 2004). In Utah and West Virginia they have free speech rights for reporting a violation of law or waste. Utah Protection of Public Employees Act, Utah Code Ann. § 67-21-1 to -9 (2000); W. Va. Code Ann. § 6C-1-1 to -8. (Michie 2003). In Wisconsin and Wyoming, free speech rights protect government workers for reporting illegality, mismanagement, abuse of authority, substantial waste or a danger to public

health and safety. Wis. Stat. Ann. § 895.65 (West 1997 and Supp. 2003); Wyo. Stat. 9-11-103 (Michie 2003). Quite clearly, a bewildering array of hit or miss statutes is no substitute for constitutional protection as a floor for this right.

The Whistleblower Protection Act's track record is a potent lesson learned of the fragility of statutory free speech rights. The law repeatedly had an overwhelming legislative mandate. As a leading commentator noted about the original 1978 passage of free speech rights, "The ideological breadth of the coalition supporting whistleblower protection indicates that the passage of these provisions is a strong congressional statement in support of the legitimacy of whistleblowing." Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Executive Branch*, 1982 U. Ill. L. Rev. 615, 619-20.

If anything, this mandate was intensified by passage of the Whistleblower Protection Act in 1989. While Congress seldom passes any significant legislation unanimously, due to a pocket veto this law was approved twice in just over five months, along with an earlier unanimous approval in the Senate. 134 Cong. Rec. S10632 (daily ed., Aug. 2, 1988); *id.* at H9323; *id.* at S.15337; 135 Cong. Rec. S10632 (daily ed., March 16, 1989); and *id.* at S2805. After Congress unanimously strengthened the Act in 1994, commentators hailed it as the strongest free speech law in history, on paper. *See, e.g.*, Thomas M. Devine, *The Whistleblower Protection Act and the Modern Law of Dissent*, 51 Admin. L. Rev. 531 (Spring 1999).

Unfortunately, the record of the Act has been one of sustained frustration for those who rely on it. S. Rep. 107-349, 107th Cong., 2d Sess. November 19, 2002. The bottom

line is that the aggrieved employee almost always loses. In appellate decisions at the Federal Circuit Court of Appeals from October 1994 until September 1, 2003, whistleblowers had a 1-84 track record for decisions on the merits. Testimony of Thomas M. Devine, *Hearings on S. 1358 before the Senate Governmental Affairs Committee* (Nov. 12, 2003), slip testimony at 25. Although in theory the statute protects "any" lawful disclosure the employee reasonably believes is evidence of listed misconduct, in reality it no longer covers disclosures to co-workers, suspected wrongdoers, supervisors who lack authority to impose corrective action; *Horton v. Department of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), or any speech except by the first person to disclose the information. *Meuwissen v. Department of Interior*, 234 F.3d 9 (Fed. Cir. 2000). Most relevant for the case at bar, the law no longer covers speech that is part of carrying out assigned duties, except if the results are taken outside channels. *Willis v. Department of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998); *Huffman v. OPM*, 263 F.3d 1341 (Fed. Cir. 2001). There can be little serious disagreement that even the best-intentioned statutes are too unstable to serve as reliable substitutes for a minimum base of constitutional rights.

IV. PETITIONER'S WARNINGS OF PARALYZED MANAGEMENT AND FLOODED COURTS HAS FAILED THE REALITY TEST.

A. Careful application of "Public Concern" Jurisprudence and *Pickering* Balance Will Check Frivolous First Amendment Claims.

Petitioner's argument for reining in "drifting First Amendment jurisprudence" is largely based upon the twin predictions of management paralysis and litigation deluge.

These are, of course, the same exhortations urged to oppose coverage of Mr. Pickering's speech 38 years ago. First Amendment coverage of government employee speech since *Pickering* has not handicapped management nor dramatically increased the volume of First Amendment litigation. Nor will coverage of job-required speech by government employees inaugurate these harms.

Furthermore, as most recently noted in *U.S. v. National Treasury Employees' Union*:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

NTEU, 513 U.S. at 475, citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994).

Wholesale denial of First Amendment protection to job-required speech is an immoderate response to the posited harms. Nevertheless, the reluctance to expand First Amendment protections to expression in the course of job duties stems from a legitimate concern that management may become unduly burdened if it is too easy to claim protected status. But frivolous free speech claims may be deterred and screened out by careful application of the discerning First Amendment jurisprudence beginning with *Pickering*. Potential mischief with an expanded scope of protection may be countered by prudent application of the *Connick* "content, form and context" test for "public concern," the nexus requirement and the time-tested

Pickering balance. *Connick*, 461 U.S. at 147-148; *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274 (1977); *Pickering*, 391 U.S. at 568.

B. Decades of Environmental Whistleblower Jurisprudence Protecting Disclosures Pursuant to Job Duties Have Not Resulted in Flood of Litigation.

For at least two decades, private employees have been protected for job-required disclosures under a number of environmental whistleblower statutes. *See, e.g.*, 15 U.S.C. § 2622 (Toxic Substances Control Act) (2005); 33 U.S.C. § 1367 (Federal Water Pollution Control Act) (2005); 42 U.S.C. § 300-j-9 (Safe Drinking Water Act) (2005); 42 U.S.C. § 5851 (Energy Reorganization Act) (2005); 42 U.S.C. § 6971 (Solid Waste Disposal Act) (2005); 42 U.S.C. § 7622 (Clean Air Act) (2005); and 42 U.S.C. § 9610 (Superfund) (2005). These statutory protections have resulted in neither managerial paralysis nor a flood of litigation. Petitioners' predictions regarding the dire consequences of extended coverage have been tested in the real world and those tests have not borne out the harm foretold.

Generally speaking, these whistleblower provisions protect any employee, private or public, who assists in enforcement of the substantive provisions of the underlying Acts.

There has been an opportunity to test Petitioners' predictions under these corporate speech statutes. In 1984, the Ninth Circuit held that internal complaints pursuant to job duties triggered protection under the ERA. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). Mackowiak, a quality control inspector at a nuclear power plant under construction, was

employed by University Nuclear Systems Incorporated (UNSI), a subcontractor of Bechtel, itself a contractor with the Washington Public Power Supply System. The duties of quality control inspectors of nuclear power plants are governed by the regulations of the Nuclear Regulatory Commission. Mackowiak inspected work performed by UNSI employees to confirm conformance with federal specifications. If an inspector found an item of possible noncompliance, he was required to write a "Request for Information" to the quality assurance department. If an inspector found improper installation or construction, he was required to "red tag" the item in question and file a Non-Conformance Report. *Id.* at 1160-61.

As part of his inspector duties, Mackowiak repeatedly made a record of UNSI safety and quality violations. For example, over the course of a month and a half, he filed a Request for Information regarding possible falsification of documentation by UNSI personnel; he filed a Request for Information regarding access to the tool cribs; and he "red tagged" a tool crib. Shortly thereafter, Mackowiak was laid off. *Id.* The Ninth Circuit found that Mackowiak's internal complaints about safety and quality, undertaken as part of his quality control inspector duties, were protected under the ERA's whistleblower provisions. *Id.* at 1163. The Court explained that they were modeled on and served the same purpose as the similar provisions of the Mine Health and Safety Act. Noting that internal safety complaints were covered under the MHSA, the Court reasoned that the rationale for coverage was even stronger in Mackowiak's case because quality control inspectors play such a crucial role in NRC oversight of nuclear plants:

> At times, the inspector may come into conflict with his employee by identifying problems that

> might cause added expense and delay. If the NRC's regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems.

Id. at 1163.

Arguing against such protection, UNSI raised the specter of a collapse of managerial authority. The Ninth Circuit responded decisively:

> UNSI argues that the Secretary's ruling [finding internal, job-required disclosures covered under the statute] would require companies to retain "abrasive, insolent, and arrogant" quality control inspectors if they comply technically with the requirements of the job. Not so. The ruling simply forbids discrimination based on competent and aggressive inspection work. In other words, contractors regulated by §5851 *may not discharge quality control inspectors because they do their jobs too well.*

Id. (emphasis added).

A year later, the Tenth Circuit approved the reasoning in *Mackowiak* and found that a quality assurance inspector who filed reports with his superiors detailing potential quality assurance problems was covered under the ERA's whistleblower provisions. *Kansas Gas & Electric Company v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985). Recognizing the Fifth Circuit had reached a different result in *Brown and Root v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), the Court discounted the decision because it failed to adequately address the remedial purposes of whistleblower statutes and the consequent necessity for a broad construction. *Kansas Gas & Electric Company*, 780 F.2d at 1513.

Whistleblower protection for private employees who raise concerns pursuant to their job duties is well-established under the environmental and nuclear whistleblower statutes administered by the Department of Labor. *See, e.g., Bassett v. Niagara Mohawk Power Co.*, 86-ERA-2 (Sec'y July 9, 1986) (the performance of quality assurance work for an employer covered by the Acts is *per se* protected activity); *Richter v. Baldwin Associates*, 84-ERA-9 to 12 (Sec'y Mar. 12, 1986); *Tyndall v. U.S. EPA*, 93-CAA-6 (ARB June 14, 1996) (job duties performed by investigator for the Inspector General of the U.S. EPA found to constitute protected activity); *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002), slip at 5 (raising safety and health issues at the LANL as part of his job as an internal assessor is covered activity); *Higgins v. Alyeska Pipeline Service Co.*, 97-CAA-13 (ALJ Order Denying Motion for Summary Decision, January 26, 1998) (performance of job duties involving investigating employee complaints about operation of pipeline found "inherently protected activity"). Protection of job-required speech under these statutes has resulted in no discernable impediment to managerial authority in the relevant private industries. Nor will coverage of job-required speech under the First Amendment.

CONCLUSION

A per se restriction of job-required speech, as proposed by Petitioners, will chill ethical conduct by governmental employees and wreak incalculable damage on the nation. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOANNE ROYCE
THOMAS M. DEVINE
GOVERNMENT ACCOUNTABILITY PROJECT
1612 K Street, NW,
Suite 1100
Washington, D.C. 20006
(202) 408-0034

MARISSA M. TIRONA
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
44 Montgomery Street,
Suite 2080
San Francisco, CA 94104
(415) 296-7629 ext. 103

JEFFREY L. NEEDLE
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
LAW OFFICES OF JEFFREY NEEDLE
119 1st Ave. South
Suite #200
Seattle, Washington 98104
(206) 447-1560

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No. 04-473

IN THE

Supreme Court of the United States

GIL GARCETTI, *et al.*,

Petitioners,

v.

RICHARD CEBALLOS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

JONATHAN P. HIATT
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations, a federation of 56 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief *amicus curiae* in support of Respondent with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The case concerns speech on a matter of public concern by a public employee to his supervisors. The public employer defendants maintain that the speech in question—as speech by the employee in the course of performing his employment duties—is not entitled to the First Amendment protection of public employee speech defined in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

The First Amendment applies generally to speech by public employees as well as to speech by members of the general public. But, as *Pickering* holds, public employee speech may be subject to restraints that would be impermissible if applied to speech by members of the general public. Under *Pickering*—which strikes the balance between the free speech interests of public employees and the performance interests of governmental employers—to justify restraints on public employee speech, the government must show that the restraints are reasonably related to promoting the efficiency of governmental functions performed through its employees.

The public employer defendants' position that the First Amendment does not cover speech by a public employee in the course of performing his employment duties cannot be squared with the *Pickering* decision most closely in point—*Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). *Givhan* held that criticism of school policies and practices voiced by a teacher in a private meeting with the school's principal were protected by the First Amendment. *Givhan* thus clearly establishes that speech by a public employee to her superiors at the workplace is covered by the First Amendment.

The public employer defendants' argument in support of their position—that public employee speech in the course of performing job duties must be categorically excluded from First Amendment protection so that the government can effectively convey its messages to an outside audience

through its employees—fails. The *Pickering* balancing test accounts for this "government speech" interest. Under *Pickering*, a government employer may restrain public employee speech in the interest of ensuring that the government's message is properly conveyed. But no such "government speech" interest is implicated where—as in this case—the public employee speech in question is addressed to the government itself and not to an outside audience.

ARGUMENT

Richard Ceballos, a deputy district attorney in the Los Angeles County District Attorney's Office, brought this § 1983 action alleging "that he was subjected to adverse employment actions by his supervisors . . . in retaliation for engaging in speech protected by the First Amendment." Pet. App. 1. In particular, Ceballos alleges that he was retaliated against for preparing and submitting to his supervisors a memorandum setting forth a summary of Ceballos's investigation into charges that a deputy sheriff's search warrant affidavit contained false statements and stating Ceballos's conclusion that the affidavit was falsified and his recommendation that the related prosecution be dismissed. Pet. App. 54-55.[2]

The defendants—the Los Angeles District Attorney and Ceballos's two supervisors—joined issue with Ceballos's § 1983 complaint by moving for summary judgment on the theory that speech by a public employee carrying out his "duties of employment," Pet. Br. i, is not speech protected by

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[2] As the law required, Ceballos informed defense counsel of his conclusion that the warrant affidavit contained false statements and testified in response to the defendant's subpoena at a hearing on the motion to suppress the warrant. Pet. App. 4. The defendants do not contend that Ceballos's compliance with his legal obligations in these two respects could justify any adverse employment action against him. Hence the extent to which the First Amendment protects these two communications is not an issue in this case.

the First Amendment. The district court agreed and dismissed Ceballos's § 1983 claim on the ground that "speech engaged in not merely as a concerned citizen but within the scope of the plaintiff's employment" is not entitled to First Amendment protection. Pet. App. 62.

Applying this Court's First Amendment precedents on public employee speech, the court of appeals rejected that categorical defense, reversed the district court's grant of summary judgment in favor of the defendants, and remanded the case for further proceedings. The court of appeals was correct to do so, as we now show.

I. It facilitates analysis of the Petitioners' argument for a categorical exception to First Amendment protection of public employee speech to begin by summarizing the general principles established by *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny.

In the *Pickering* line of cases, the Court started from the basic proposition that "[a] government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment." *City of San Diego v. Roe*, 543 U.S. ___, 125 S.Ct. 521, 523 (2004). And, based on that proposition, "[t]he Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment." *Ibid.*

At the same time, the Court has also recognized "that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568. To vindicate these special interests, the Court has held that "a governmental employer may impose certain restraints on the speech of its

employees, restraints that would be unconstitutional if applied to the general public." *City of San Diego*, 125 S.Ct. at 523.

In her opinion for the plurality in *Waters v. Churchill*, 511 U.S. 661, 671 (1993), Justice O'Connor provided the fullest explanation of "[w]hat i[t] i[s] about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large":

> "[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. * * *
>
> "The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate." *Id.* at 674-675.

Against that background, "[t]o reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission, the *Pickering* Court adopted a balancing test." *City of San Diego*, 125 S.Ct. at 524-525. The *Pickering* test "requires a court evaluating restraints on a public employee's speech to balance 'the interests of the [employee], as a citi-

zen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* at 525, quoting *Pickering*, 391 U.S. at 568.

Under *Pickering*, "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick v. Myers*, 461 U.S. 138, 150 (1983). And, "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.* at 152.

Moreover, "[i]n performing the [*Pickering*] balancing, the [public employee's] statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Among the "pertinent considerations [are] whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationship for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with regular operation of the enterprise." *Ibid.* "These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise." *Ibid.*

II. It is the Petitioners' position that, as a categorical matter, the *Pickering* First Amendment protections do not reach public employee "speech engaged in during the normal course and scope of employment, in accordance with the duties of employment." Pet. Br. 27. That position suffers from two fatal flaws.

A. First, the *Pickering* case most closely in point—*Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)—cuts directly against the Petitioners' position.

In *Givhan*, "a junior high English teacher" was discharged for "privately express[ing] her complaints and opinions to the [junior high school] principal" concerning "employment policies and practices at [the] school which [the teacher] conceived to be racially discriminatory in purpose or effect." 439 U.S. at 411 & 413. The *Givhan* Court unanimously rejected the proposition that the teacher was not entitled to *Pickering* First Amendment protection, holding instead that *Pickering* does protect the speech of a "public employee who arranges to communicate privately with his employer." *Id.* at 415.

A workplace meeting at which a public employee privately discusses with her supervisor the public employer's employment policies and practices is, to use the Petitioners' phrase, most certainly "speech engaged in during the normal course and scope of employment, in accordance with the duties of employment." Pet. Br. 27. And, *Givhan* squarely holds that such public employee speech *is* entitled to *Pickering* First Amendment protection. The *Givhan* Court emphasized that point by stating that "striking the *Pickering* balance . . . may involve different considerations" when "a government employee personally confronts his supervisor" as opposed to "speak[ing] publicly." 439 U.S. at 415 n. 4.

The lesson of *Givhan* is that *Pickering* First Amendment protection is *not* confined to instances in which the public employee, acting outside the course and scope of employment, "spreads his views before the public." 439 U.S. at 416. The *Pickering* balancing test also protects "the public employee who arranges to communicate privately with his employer," *id.* at 415, on employer policies and practices of public concern.

That being so, under *Pickering*, the First Amendment's protections apply not only to Givhan's speech to her employer at a workplace meeting on allegedly discriminatory employment practices but to Ceballos's preparation and

submission to his supervisors of the memorandum on the allegedly false search warrant affidavit. For in both instances, the public employee is addressing his superiors on a matter of public concern.

B. The second flaw in the Petitioners' position is that their supporting arguments do not come close to justifying their proposed categorical exception to *Pickering*'s First Amendment protection of public employee speech..

The Petitioners' essential argument is that "public employees necessarily speak on behalf of the government when they engage in routine, job-required speech" and it follows that "such speech (expressed *on behalf* of the government) should not give rise to actionable First Amendment claims *against* the government." Pet. Br. 32 (emphasis in original). Supporting the Petitioners' position, the United States puts this point as being that "'the government is entitled to control the content of the speech' because it is the government's message that is being conveyed and the government has in effect '"purchased" the speech.'" U.S. Br. 20 quoting *Urofsky v. Gilmore*, 216 F.3d 401, 408 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

(1) To begin with, the Petitioners' argument does nothing to advance their position in the present class of cases. While there is no question that "when the [government] is the speaker, it may make content-based choices" and "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted" by those it employs to deliver that message, "[i]t does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833-834 (1995). *See Legal Services Corp. v. Velazquez*, 532 U.S. 533, 540-542 (2001).

A public employee is self-evidently *not* engaged in delivering the government's message when, in the employment setting, he states his own views to his supervisors on what the

government's message or actions should be. Nor is such an employee addressing an audience that the government seeks to reach with a government message. Rather, the employee is delivering a message of his own to the appropriate internal government audience. Thus, the argument that First Amendment protection should be denied to such public employee speech in furtherance of the government's interest in controlling speech conveying the government's message fails at its premise.

In contrast, there is every reason to accord *Pickering* First Amendment protection to public employee speech on a matter of public concern addressed to an appropriate internal government audience.

Pickering's precise point is "to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin*, 483 U.S. at 384. Thus, this Court has repeatedly "held that government workers are constitutionally protected from dismissal . . . for publicly or privately criticizing their employer's policies." *Board of Commissioners v. Umbehr*, 518 U.S. 668, 674-675 (1996) (citations omitted).

As *Givhan* shows, and as this case indicates, public employee speech on a matter of public concern addressed to an appropriate internal government audience warrants and needs that protection.

(2) Given the variegated nature of public employee speech on the government's behalf to an outside audience and the substance of the *Pickering* First Amendment protection, the Petitioners' "government speech" argument does not advance their categorical position even in the class of cases that *does* involve such public employee speech—a class of cases that that is entirely distinct from the instant case. *See* p. 3, n. 2, *supra*.

The *Pickering* balancing test provides that "a governmental employer may impose certain restraints on the speech of its employees" in order "to protect its own legitimate interests in performing its mission." *City of San Diego*, 125 S.Ct. at 523 & 524. Conveying the government's message accurately and effectively to the public is part of that mission. And, the *Pickering* balancing test most certainly permits government restraints on public employee speech in the service of assuring that the public employee assigned to convey a government message carries out that assignment properly.

The *Pickering* test thus fully and properly serves the government's legitimate interests in this regard. Equally to the point, the Petitioners' categorical position is both unnecessary to serve any legitimate government interest and a position that cuts too deeply into the important free speech interests recognized in *Pickering*.

In many instances, public employee speech to an outside audience involves communicating both a message defined by the government and a message that of necessity is defined by the public employee speaker. And, where such speech is at issue, the Petitioners' categorical exception to *Pickering* First Amendment protection would enable "public employers [to] use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin*, 483 U.S. at 384.

(3) The Petitioners embellish their "government speech" argument with the claim that "allowing any and all routine, job-related speech to act as the basis for an actionable First Amendment claim" will have "a widespread chilling effect on necessary and appropriate employment actions." Pet. Br. 36 & 38. This is hyperbole.

"[N]ecessary and appropriate employment actions" are, of course, precisely what the *Pickering* balance is intended to allow. That being so, the Petitioners' claim is not based on

any showing that unwarranted adverse judgments have been or are likely to be obtained. Rather, the Petitioners' point is that "such [necessary and appropriate employment] actions could be linked (by allegation) to a prior instance of routine, job-required speech," *id*. at 38, and that "such a claim would not be subject to dismissal at the pleading stage [so that] the defendant . . . would have to wait until the summary judgment stage, at the very least, to obtain dismissal of the claim," *id*. at 36. That is not a point of any substance.

A defendant may move for summary judgment at any time. Rule 56(b), Fed.R.Civ.P. Thus, as a general matter, summary judgment provides a sufficiently expeditious procedure to "permit the resolution of many insubstantial claims" in a manner that "avoid[s] excessive disruption of government" through drawn out litigation. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Beyond that, we would add that the categorical rule advocated by the Petitioners is more likely to complicate than it is to simplify First Amendment litigation in this area. In all events, as the United States recognizes, *Pickering*'s First Amendment protection clearly extends to speech "related to the public employee's job and communicated at the workplace." U.S. Br. 18. And, to the "public concern" threshold articulated in *Connick v. Myers, supra*, the Petitioners would add a second, outside-the-scope-of-employment threshold before reaching the *Pickering* balancing process. But, the determination when job-related workplace speech is with-in or without a public employee's scope of employment will, in many instances, not be easy.

Thus, erecting a second hurdle that must be cleared before the trial court can get on with the *Pickering* balancing test will not simplify the disposition of meritless claims. Rather, it will simply multiply the preliminary determinations that must be made befo the real merits of the plaintiff's First Amendment claim can be reached.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

JONATHAN P. HIATT
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

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IN THE
Supreme Court of the United States

GIL GARCETTI, FRANK SUNDSTEDT, CAROL NAJERA, and COUNTY OF LOS ANGELES,

Petitioners,

v.

RICHARD CEBALLOS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

BONNIE I. ROBIN-VERGEER
Counsel of Record
SCOTT L. NELSON
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

HUMBERTO GUIZAR
MORENO, BECERRA, GUERRERO & CASILLAS
3500 West Beverly Boulevard
Montebello, CA 90640
(323) 725-1151

Counsel for Respondent

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QUESTION PRESENTED

Does a prosecutor who speaks on a matter of public concern by reporting suspected police misconduct to his superiors lose his First Amendment protection against retaliation by his employer solely because he communicated his message while performing his job?

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STATEMENT OF THE CASE

Respondent Richard Ceballos, a Deputy District Attorney in the Los Angeles ("LA") County District Attorney's Office ("DA's Office"), reported to his supervisors that he believed that a Deputy Sheriff had falsified an affidavit used to obtain a search warrant in a criminal matter under Ceballos's supervision. His superiors retaliated by taking several adverse actions against him. As we explain below, Ceballos should presumptively be entitled to First Amendment protection for his speech on a matter of public concern regardless of the fact that he communicated it in the course of performing his job duties.

1. The Facts. The facts, viewed in the light most favorable to Ceballos, are as follows. Richard Ceballos has served as a Deputy District Attorney in LA since 1989. J.A. 7. In 1997 or 1998, he was assigned to the Pomona Branch of the DA's Office as a trial deputy. J.A. 8-9. Less than a year later, petitioner Frank Sundstedt, Head Deputy of the Pomona Branch, promoted Ceballos to calendar deputy, a position giving him supervisory authority over more junior prosecutors and primary responsibility for prosecutions brought in the courtroom to which he was assigned. J.A. 9, 24-26; *see also* J.A. 100-102. Sundstedt rated Ceballos "outstanding" in his performance evaluation, intending that he be seriously considered for further promotion. J.A. 102-103, 106; *see also* J.A. 492.

In March 2000, when the events at issue here took place, the interest of the LA community in preventing, disclosing, and rectifying police misconduct was at its zenith. Six months earlier, LA had been shaken by one of the worst police scandals in U.S. history, involving corruption and widespread abuses by an anti-gang unit of the LA Police Department ("LAPD") assigned to the Rampart area of the city. The Rampart scandal broke in mid-September 1999, when a member of the Rampart unit, Rafael Perez, then being tried on drug-theft charges, revealed in exchange for leniency that he and another officer had shot an unarmed man and planted a gun on him to cover it up. Matt Lait & Scott Glover, *Rampart Case Takes on*

Momentum of Its Own, LA Times, Dec. 31, 1999, at 1; Scott Glover & Matt Lait, *Ex-Officer Calls Corruption a Chronic 'Cancer'*, LA Times, Sept. 21, 1999, at 1. Perez implicated dozens of officers in the Rampart unit in criminal activities and serious acts of misconduct, including attempted murder, planting evidence, false imprisonment, beatings, theft of money and drugs, unauthorized searches, obstruction of justice, false police reports, and perjury. *Report of the Rampart Independent Review Panel* 5 (2000), *available at* http://www.lacity.org/oig. The scandal led to the overturning of more than 100 convictions, the departure of more than a dozen officers, the payment of $70 million to victims, and the LAPD's entry into a consent decree with the U.S. Department of Justice requiring extensive reforms. Scott Glover & Matt Lait, *LAPD Settling Abuse Scandal,* LA Times, Mar. 31, 2005, at A1.

a. Against that backdrop, in February 2000, Richard Escobedo, a lawyer representing one of the defendants in *People v. Cuskey,* a case assigned to Ceballos's courtroom, asked Ceballos to investigate whether one of the arresting deputies from the LA County Sheriff's Department had lied in an affidavit used to obtain a warrant to search Michael Cuskey's property. J.A. 28-30. The defense had filed a motion to traverse, or challenge, the warrant under *Franks v. Delaware,* 438 U.S. 154 (1978), which held that a defendant may attack the veracity of a facially valid search warrant affidavit. J.A. 506-13. Although the warrant sought evidence relating to a stolen and stripped pickup truck found on a street some distance from the premises to be searched, the defendants were charged with narcotics and weapons offenses after the deputies, with the aid of a drug-sniffing dog, uncovered methamphetamine and firearms on the property. J.A. 495-502; *see generally* J.A. 198-363. The search yielded no sign that Cuskey's property was used as a stolen-car "chop shop," and none of the defendants was charged with possessing stolen property. J.A. 346-47.

Ceballos agreed to look into the matter. J.A. 30. He considered the accusation in a deliberate manner. He reviewed

the case file and spoke to the prosecutor assigned to the case. J.A. 31-32. Comparing photographs and a videotape of the area in question with the property description in the affidavit, he noticed that "[t]here was clearly a mischaracterization of the description of the property. The way the deputy had described it . . . did not at all match what the photographs were depicting." J.A. 32. For example, the deputy had characterized as a "long driveway" the road on which two other deputies had supposedly observed tire tracks that "appeared to match the [truck's] tread pattern," leading from the stripped pickup truck to the defendant's home. In fact, however, the "driveway" was more like a separate road several hundred feet in length, several car lengths in width, and bordered by many residences, rendering it highly unlikely that the deputies could have traced tire tracks from the defendant's home to the street. J.A. 32-34, 497-500.

The discrepancy having raised a red flag, Ceballos visited the crime scene. He drove up and down the "driveway" in his truck to see whether he could leave detectable tire tracks or tread patterns and determined that it was impossible to do so because the road's composition of broken asphalt, gravel, and dirt was not conducive to maintaining tire tracks along its complete length. J.A. 34, 36, 499-500. Ceballos then called and spoke to the affiant, Deputy Sheriff Keith Wall. Ceballos confronted him with the defense's accusation that the tire tracks described in Wall's affidavit never existed. Wall responded to Ceballos: "Well, that's what they told me," alluding to Deputies Murray Simpkins and Daniel Spitulski, who had found the pickup truck and allegedly followed the tire tracks up the driveway to Cuskey's property. J.A. 35-37, 501.

His suspicions now thoroughly aroused, Ceballos talked to his fellow prosecutors, showing them the photographs and videotape and describing the facts. Every prosecutor Ceballos consulted agreed that the validity of the warrant was questionable. J.A. 39. At that point, Ceballos turned to his immediate supervisor, petitioner Carol Najera, and Head Deputy Sundstedt. Ceballos showed each of them the videotape and

photographs and described what he personally observed at the crime scene. J.A. 39-40. Najera and Sundstedt agreed with Ceballos that there was a problem with the warrant. J.A. 39. Ceballos determined that the prosecution could not justify pursuing the case if the warrant were invalid. J.A. 48.

b. It was only after this extended consideration of the facts and consultation with colleagues and superiors that, on March 2, 2000, Ceballos prepared a memorandum for Sundstedt reporting his assessment that Deputy Wall's affidavit had relied on inaccurate, misleading, and possibly outright false information. Ceballos recommended that the criminal cases against the three defendants be dismissed. J.A. 495-502 (revised version). Ceballos's initial version of the memorandum was direct and to the point, accusing Wall of perjury. J.A. 112-13. After reviewing the memorandum, Sundstedt directed Ceballos to revise it to make it less accusatory, particularly because it was to be shared with the Sheriff's Department. J.A. 41-42, 112-14. Ceballos complied, J.A. 42, 113, but the memorandum continued to reflect his conclusions that the deputy's characterizations in his affidavit were "grossly inaccurate," "clearly misleading," omitted key facts, and, quite possibly, were wholly fabricated. J.A. 495-502. Ceballos then destroyed the original version. J.A. 42. It is undisputed that Ceballos spoke up to bring the deputies' suspected abuse of authority to light and to do justice for the defendants in the criminal case, and not to further any personal grievance. Pet. App. 19.

Throughout their brief, petitioners characterize Ceballos's March 2 memorandum as a "routinely prepared" disposition memorandum/report, Pet. Br. 4, 6, 7, 25, 31, 32, 36, 38, but that characterization is misleading and unsupported by the record. Ceballos does not dispute that he prepared the memorandum "pursuant to his duties as a prosecutor." J.A. 435-36; *see also* Pet. App. 64. But as common sense would suggest, the March 2 memorandum was not only far from "routine," it was extraordinary. Petitioners' citation to J.A. 40-41 (Ceballos

Depo. Tr. 88), in which Ceballos explained that "disposition reports" are commonly prepared, skips an important statement by Ceballos in the same deposition passage. On omitted page 89, Ceballos testified in response to a question whether he had previously prepared a disposition report accusing a police officer of misconduct:

> No. This would have been the first disposition report I've ever written where I was recommending a dismissal or had dismissed a case because of questions regarding the credibility of a police officer. I've done it with other witnesses, but this is the first with a police officer.[1]

Although Ceballos believed he was ethically and constitutionally bound to report the deputies' suspected misconduct to Sundstedt, no policy of the DA's Office required him to do so. Not until November 2001, as part of the fallout from the Rampart scandal, did the office, under a new District Attorney, issue such a policy. *See* Special Directive 01-10, at 1 (Nov. 7, 2001), *available at* http://da.co.la.ca.us/restoring.htm.

On March 6, 2000, Ceballos wrote a second memorandum to Sundstedt reporting a conversation with Deputy Wall, in which Ceballos had stated that Wall's affidavit appeared to be "grossly inaccurate" and that Ceballos had visited the location of the search and found it implausible that discernible tire tracks could be seen along the roadway's entire length. J.A. 502-03. Wall had responded that, after speaking to Deputies Simpkins and Spitulski, he now believed the affidavit should have been "modified" to say the deputies had observed "tire gouges,"

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[1] Pages 87-88 and 90-92 of Ceballos's deposition testimony, J.A. 39-44, were made a part of the record at summary judgment, but page 89 was not. Ceballos respectfully submits that the Court should not rely on his testimony about the allegedly mundane nature of a disposition memorandum without considering his statement about this specific memorandum. He would be pleased to lodge the missing page of the deposition at the Court's request.

caused by the rims of the stolen truck scraping along the roadway, and not "tire tracks," as the affidavit stated. J.A. 503.

c. Frank Sundstedt was "extremely concerned" about Ceballos's allegations, J.A. 112, and treated them as an exceptional revelation, telling Ceballos that in his "25-plus years with this office, [he had] never come across this." J.A. 80; *see also* J.A. 81. Sundstedt agreed that Ceballos had followed exactly the right procedure in bringing his suspicions to Sundstedt's attention. J.A. 111. So seriously did Sundstedt initially take Ceballos's disclosures that he took the unusual step of authorizing Ceballos to obtain the release from custody of defendant Douglas Ojala, who had already pleaded guilty, pending an upcoming meeting with the Sheriff's Department about Ceballos's memorandum. J.A. 44, 54, 200-01, 496. At the hearing in connection with Ojala's authorized release, Ceballos explained to Richard Escobedo, who was standing in as Ojala's lawyer, why he was taking the action. J.A. 54.

The revised March 2 memorandum, if not both memoranda, was faxed to the Sheriff's Department, J.A. 27, 44, 487-88, and a meeting was held on March 9, 2000, attended by Ceballos, his supervisors, and representatives from the Department. J.A. 27, 114-16, 488. The tide now turned against Ceballos. A lieutenant verbally attacked him, accused him of acting like a "public defender," criticized him for not putting the case on and letting the judge decide, and demanded his removal from the case. J.A. 44-47, 488. A captain wanted the prosecution to proceed because he feared a lawsuit from one of the defendants, who had filed one against the Department before. J.A. 49; *see also* J.A. 238-39, 488. At the end of the meeting, Sundstedt decided to proceed with the case pending the outcome of the motion to traverse. J.A. 50-51, 116-18.

About a week later, the *Cuskey* defense issued a subpoena to Ceballos to testify at the hearing on the motion to traverse. J.A. 53-54, 503-06. Ceballos approached Najera to discuss his view that both his March 2 and 6 memoranda contained *Brady* material and should be turned over to the defense before the

hearing. J.A. 54-57, 418-19. Najera initially responded that they could not disclose the memoranda because they would be sued by the deputy sheriffs for defamation; she instructed Ceballos to write a new memorandum instead that contained only the statements of Deputy Wall and omitted everything else. J.A. 55; *see also* J.A. 418, 420-21. Ceballos told Najera that he did not believe rewriting the memoranda was appropriate and that the proper course was for him to turn over the memoranda with work product redacted. J.A. 56. Although initially Najera was not receptive to redaction, *id.*, she later agreed after consulting with others in the DA's Office. J.A. 419; *see also* J.A. 489-90. Ceballos, with Najera's authorization, provided the redacted memoranda to the defense.[2] Shortly thereafter, Najera called Ceballos into her office and made a veiled threat of reprisal if he insisted on testifying candidly at the hearing. J.A. 57-59; *see also* J.A. 490-91.

The hearing was held on March 20, 2000. J.A. 198-363. According to Sundstedt, he gave "marching orders" to Najera, who represented the prosecution at the hearing, to allow the trial judge to have "every piece of information out there so that he could make an informed decision" on the warrant's validity. J.A. 133. Najera apparently understood her orders differently, however. She objected to the defense calling Ceballos as a witness. J.A. 286. Although the court permitted Ceballos to testify, it sustained most of Najera's objections to his testimony, allowing Ceballos to testify only about the statements Wall had made to him. J.A. 295-307. The trial judge later remarked to Ceballos that Najera's conduct toward him on the stand was "very chastising, rude, and hostile." J.A. 87; *see also* J.A.

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[2] The amicus briefs reflect confusion about this chain of events. *See, e.g.*, U.S. Br. 2 n.1; Nat'l Ass'n of Counties Br. 20-21. Petitioners have never argued either that Ceballos's disclosure of the redacted memoranda to the defense was insubordinate, as the National Association of Counties asserts, or that the disclosure did not occur, as the brief of the United States suggests. References to the memoranda at the hearing confirm that the disclosures occurred. *See* J.A. 291-92, 294, 303, 304.

413-14, 492. The court denied the defense motion. J.A. 351.

d. Over the next six months, the DA's Office took a series of retaliatory employment actions against Ceballos because of his oral and written statements to his supervisors and his hearing testimony. Sundstedt demoted Ceballos from calendar deputy to trial deputy. J.A. 22-23, 26, 62-66. He reassigned one of Ceballos's murder cases to a junior colleague with no murder trial experience and stopped assigning Ceballos new murder cases, J.A. 66-73, undercutting his chances for promotion. J.A. 70, 125-26. At the end of August 2000, Ceballos was denied a promotion, a decision made by then-District Attorney Gil Garcetti, J.A. 364-65, but one heavily influenced by Sundstedt, who was asked, post-*Cuskey,* J.A. 110, to name his top three or four candidates for promotion at Ceballos's level and did not mention Ceballos. J.A. 73-79, 107-10, 365-67. Finally, in September 2000, Najera and Sundstedt transferred Ceballos to the Rio Hondo courthouse in El Monte, significantly lengthening his commute, J.A. 11-19, 493—a form of punishment Ceballos described as "freeway therapy." J.A. 13.

e. Ceballos filed a grievance challenging these actions. J.A. 485-513. While it was pending, he spoke out at the Mexican-American Bar Association ("MABA") about the Sheriff Department's alleged misconduct in the *Cuskey* case, the lack of a policy in the DA's Office for dealing with suspected police misconduct, and the retaliatory measures taken against him. J.A. 84-85. The MABA president called Garcetti to discuss the group's concerns about Ceballos's allegations. J.A. 85-86, 430-31. On October 5, 2000, only two days after Ceballos spoke at MABA, the DA's Office denied Ceballos's grievance. J.A. 84, 514-28. Ceballos contends that his grievance was denied at least in part because he spoke to MABA. J.A. 83-84, 144.

On October 28, 2000, Ceballos filed an action under 42 U.S.C. § 1983 against Sundstedt, Najera, Garcetti, and LA County challenging their retaliation for his exercise of First Amendment rights. He also asserted a state-law claim for

intentional infliction of emotional distress. J.A. 136-48; R.1.

2. The District Court Decision. On January 30, 2002, the district court granted petitioners' motion for summary judgment, concluding that they were entitled to qualified immunity on Ceballos's § 1983 claim because his speech was not protected by the First Amendment.[3] Citing *Connick v. Myers,* 461 U.S. 138 (1983), the court acknowledged that "[a]t first blush . . . Plaintiff's speech clearly involved a matter of public concern. For reasons that need not be recited—the code word 'Rampart' says it all—there can be no doubt that, in Southern California, police misconduct is a matter of great political and social concern to the community." Pet. App. 61-62. Yet "[d]espite the intrinsic and important public interest in excluding perjured evidence from court proceedings," the court continued, Ceballos's speech did not touch on a matter of public concern for First Amendment purposes because he wrote his memorandum "as part of his job," Pet. App. 62, and in fulfillment of his duties under the due process clause "not to introduce or rely on evidence known to be false." Pet. App. 64.

3. The Court of Appeals Decision. The court of appeals reversed and remanded for further proceedings, finding that "the law was clearly established that Ceballos's speech addressed a matter of public concern and that his interest in the speech outweighed the public employer's interest in avoiding inefficiency and disruption." Pet. App. 2.

a. In the court's view, critical under the threshold analysis established in *Connick* was whether the "point of the speech in question" was "to bring wrongdoing to light" or "to raise other issues of public concern." Pet. App. 10 (quoting *Roth v. Veteran's Admin.,* 856 F.2d 1401, 1406 (9th Cir. 1988)). The

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[3] Earlier, the district court had granted, on Eleventh Amendment grounds, a motion for summary judgment on Ceballos's claims against LA County and Garcetti in his official capacity. R. 20; Pet. App. 2. When the court granted summary judgment to the individual defendants, it declined to exercise supplemental jurisdiction over the state-law claim. Pet. App. 66-67.

court deemed Ceballos's allegations that a deputy sheriff may have lied in a search warrant affidavit to constitute "whistleblowing" and observed that "when government employees speak about corruption, wrongdoing, misconduct, wastefulness, or inefficiency by other government employees, including law enforcement officers, their speech is inherently a matter of public concern." *Id.* (citing cases). The court rejected petitioners' contention that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed . . . pursuant to an employment responsibility." Pet. App. 11. The court cited *Roth*, in which it had held that a plaintiff employed as a "troubleshooter" at the Veterans Administration addressed matters of public concern under *Connick* when he exposed corruption, mismanagement, and other problems in written reports prepared as part of his job duties, along with other cases. Pet. App. 11-12.

The court of appeals explained that public employees "'are positioned uniquely to contribute to the debate on matters of public concern,'" Pet. App. 13 (citation omitted), and that "[s]tripping them of that right when they report wrongdoing or other significant matters to their supervisors would seriously undermine our ability to maintain the integrity of our governmental operations." *Id.* The court believed that the petitioners' proposed per se rule would be "particularly detrimental to whistle-blowers, such as Ceballos, who report official misconduct up the chain of command, because all public employees have a duty to notify their supervisors about any wrongful conduct of which they become aware." *Id.* It noted the perverse incentive that would be created by a rule protecting employees only if they bypassed their superiors and took their information directly to the press. Pet. App. 14. A blanket exclusion for on-the-job speech, the court continued, would also violate principles announced in *Connick,* which did not distinguish "between internal and external whistleblowing when it noted that speech that is 'of public import in evaluating the performance of the District Attorney' may include efforts by an

employee 'to bring to light actual or potential wrongdoing or breach of public trust.'" *Id.* (quoting *Connick,* 461 U.S. at 148).

b. Applying the balancing test of *Pickering v. Board of Education,* 391 U.S. 563 (1968), the court of appeals found Ceballos's speech of significant value because he sought "'to bring wrongdoing to light, not merely to further some purely private interest.'" Pet. App. 19 (citation omitted). It found no evidence that Ceballos had spoken recklessly or in bad faith. Pet. App. 20. Most importantly, the court observed that petitioners "offer[ed] no explanation as to how Ceballos's memorandum to his supervisors resulted in inefficiency or office disruption. Ceballos tried to address the problem initially by reporting the matter to his supervisors, obviously an appropriate way of seeking a responsible solution." Pet. App. 21. Because petitioners "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office, there is little for us to weigh in favor of the individual defendants under *Pickering*." Pet. App. 22.[4]

c. The court ruled that it was clearly established that Ceballos's speech was protected by the First Amendment. Pet. App. 23-25. It rejected petitioners' argument that the undisputed facts showed that the adverse employment actions were undertaken for nonretaliatory reasons, concluding that "a reasonable jury could infer that Ceballos's speech was a substantially motivating factor." Pet. App. 25-26 & n.10. Finally, the court reversed the district court's Eleventh Amendment ruling and its dismissal of Ceballos's state-law claim. Pet. App. 32.

d. Judge O'Scannlain specially concurred. He agreed that the Ninth Circuit's decision in *Roth* controlled, but believed that *Roth* should be overruled. Pet. App. 32-33. In his view, the court had ignored the significance of "*Connick*'s distinction

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[4] Because the court of appeals found that the March 2 memorandum was protected under the First Amendment, it did not consider Ceballos's other communications. Pet. App. 7.

between speech offered by [a] public employee acting *as an employee* in carrying out his or her ordinary employment duties and speech spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import." Pet. App. 36.

SUMMARY OF ARGUMENT

In the nearly 40 years since this Court recognized that public employees enjoy a First Amendment right to express themselves on matters of public concern without fear of retaliation by their employers, it has never held that speech addressing matters of public importance uttered by the public employee in his or her role as "employee" is unprotected. Indeed, what the Court's decision in *Connick v. Myers,* 461 U.S. 138 (1983), added to its ruling 15 years earlier in *Pickering v. Board of Education,* 391 U.S. 563 (1968), is an answer to the question whether expression by public employees is constitutionally protected when they speak as employees. That answer is yes—so long as the employee is speaking on a matter of public concern and her interest in speaking is not outweighed by her employer's interest in the efficient performance of its public mission. Taking their cue from this Court, nearly all of the circuits have held that speech by a public employee that occurs as part of his or her employment duties is *not*, for that reason alone, excluded from First Amendment protection.

In 2002, there were more than 21 million federal, state, and local government employees in the United States. U.S. Census Bureau, Statistical Abstract of the United States 2004-2005, No. 453, at 298. Although the government, *as employer,* has broad authority to control their workplace activities, those 21 million Americans are the best situated of all citizens to discover, disclose, and correct abuses of power that arise when the government is acting *as sovereign*. In service to the First Amendment principle of self-government, this Court and the lower courts have placed on the highest rung of First Amendment protection speech addressing the government's

conduct of its affairs, especially revelations of misconduct.

Like all citizens, the nation's public employees potentially have messages of critical public importance to communicate, sometimes to the public and sometimes to their employers—information about abuse of authority, violations of law, or gross mismanagement by the government; breaches of national security; dangers to public health and safety; and a host of other subjects of paramount significance to their communities. But if this Court accepts the per se rule urged by petitioners and the United States, the nation's millions of public employees will be stripped of constitutional protection from retaliation if they communicate that information as part of their jobs. The loss of First Amendment protection will create powerful incentives for them to remain silent, to avoid proper internal channels of communication and instead to "go public," or to turn information over to less knowledgeable workplace surrogates or members of the general public who could make the same disclosure without being accused of having "merely" fulfilled a job function. Neither sound First Amendment principles nor the exaggerated fears of petitioners and their amici that protecting on-the-job speech will undercut the ability of public employers to control their employees' job performance suggest that such a drastic change is wise or necessary.

ARGUMENT

It is undisputed that Richard Ceballos's speech reporting his suspicions that a deputy sheriff had engaged in misconduct addressed a topic of tremendous concern to his community. Whether Ceballos's interest in his speech outweighed that of his employer in punishing it, whether petitioners in fact retaliated against Ceballos for his speech, and whether, for purposes of qualified immunity, any violation of Ceballos's First Amendment rights was clearly established at the time of the retaliation, are not before the Court. The only question presented is whether the bulk of Ceballos's statements are constitutionally unprotected for the sole reason that he spoke as

part of his job. The answer to that question is no.[5]

I. THIS COURT'S PRECEDENTS HAVE RECOGNIZED FIRST AMENDMENT PROTECTION FOR SPEECH ON MATTERS OF PUBLIC CONCERN EXPRESSED BY PUBLIC EMPLOYEES IN THEIR ROLES AS EMPLOYEES.

A. According Constitutional Protection To Speech By Public Employees Comports With Fundamental First Amendment Principles.

Both the United States and the special concurrence proceed from the premise that the *sole* purpose of the First Amendment is to protect the personal interest of the speaker. U.S. Br. 19; Pet. App. 40-42. That premise is flawed. The First Amendment is concerned with far more than the individual's interest in self-expression. When government employees are silenced, it is the *public* that is the principal loser.

1. ***Principles of Self-Government.*** As much or more than any other value, the First Amendment serves the people's interest in self-government. "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984). Thus, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *see also* Alexander Meiklejohn, *Free Speech And Its Relation to Self-Government* 25-27 (1948). Because of its central role in enabling the public to govern itself,

[5] Both Ceballos's testimony as a witness under subpoena at the hearing on the defense motion and his communication to MABA, however, occurred outside his job duties and could not conceivably be deemed either "employee speech" or "government speech." Thus, at a minimum, the case must be remanded for further proceedings regarding these particular communications.

"expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citation omitted). The constitutional safeguard was fashioned for the very purpose of "assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (citation omitted). "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

But "public debate must not only be unfettered; it must be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression." *Board of Educ. v. Pico*, 457 U.S. 853, 867 n.20 (1982) (plurality opinion) (citation omitted); *accord First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 n.18 (1978); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985) (White, J., concurring) ("In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance."). "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); *see, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976).

Abuse of power, unlawful activity, misconduct, or gross mismanagement by government are chief among issues that demand a well-informed public so that the citizenry can compel government to correct its abuses and can hold public officials accountable. As Professor Meiklejohn put it: "[T]he body politic, organized as a nation, must recognize its own limitations of wisdom and of temper and of circumstance, and must,

therefore, make adequate provision for self-criticism and self-restraint." Meiklejohn, *supra,* at 12-13; *see also* Vincent Blasi, *The Checking Value in First Amendment Theory,* 3 Am. B. Found. Res. J. 521, 527-44 (1977). To that end, this Court has acknowledged that the disclosure of "information relating to alleged governmental misconduct . . . has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith,* 494 U.S. 624, 632 (1990); *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1034 (1991) (plurality opinion) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment.").

2. *Public Employee Cases.* In *Pickering v. Board of Education,* 391 U.S. 563 (1968), this Court recognized that the First Amendment value of promoting self-government extends to speech by public employees. Marvin Pickering was a public-school teacher who was dismissed for writing a letter to a newspaper that criticized the school board's handling of revenue-raising proposals and allocation of financial resources. *Id.* at 564-66. In upholding the teacher's First Amendment right against discharge, the Court emphasized that school funding was "a matter of legitimate public concern" on which "free and open debate is vital to informed decision-making by the electorate." *Id.* at 571-72. The Court viewed the teacher's knowledge gained from his employment as an asset, not a detriment, to that vigorous public debate, observing that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent,' and thus, it was "essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 572.

The Court's decision in *Pickering* did *not* depend on the rationale that the public-school teacher should have "the same right[s] enjoyed by his privately employed counterpart." U.S. Br. 23 (quoting *Urofsky v. Gilmore,* 216 F.3d 401, 407 (4th Cir. 2000) (en banc)). There is no First Amendment constraint that would prevent a *private* school from firing a teacher for

speaking out against the school's policies—regardless of whether the teacher expressed that view as part of her job *or* in a letter to the editor. Parity with the private sector would mean no First Amendment protection at all for public employees. The United States' effort to shrink the First Amendment rights of public employees in this manner, *id.* at 24, resurrects what, 35 years ago, Professor Van Alstyne called a "lazy analogy" that "is condemned by the express constitutional distinction between private and governmental action." William W. Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy,* 16 UCLA L. Rev. 751, 753 (1969). Instead, the analogy the Court drew in *Pickering* was between public employees and members of the general public. When the public employer's interest in limiting its employee's opportunity to speak is not significantly greater "than its interest in limiting a similar contribution by any member of the general public," *Pickering,* 391 U.S. at 573; *see also id.* at 582 n.1 (White, J., concurring in part and dissenting in part), the employer's interest gives way to the employee's right to free expression. Thus, the relevant question is whether the employee's speech has such an impact on the employment relationship or the functioning of the workplace itself as would justify the employer's curtailing the expression. *See* Thomas I. Emerson, *The System of Freedom of Expression* 570-71 (1970).

Since this Court's decisions in *Pickering* and *Connick v. Myers,* 461 U.S. 138 (1983), expression by a public employee that relates "to any matter of political, social, or other concern to the community" is presumptively protected under the First Amendment. *Connick,* 461 U.S. at 146.[6] Of particular

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[6] *See, e.g., Rankin v. McPherson,* 483 U.S. 378, 386 (1987) (public employee statement that if another attempt to assassinate the President were made, she hoped "they get him," was on matter of public concern because it addressed "the policies of the President's administration" and involved "a matter of heightened public attention"); *Connick,* 461 U.S. at 149 (question on survey whether prosecutors felt pressured to work in political campaigns was "matter of interest to the community upon which it is essential that

relevance here, the Court has acknowledged that speech "seek[ing] to bring to light actual or potential wrongdoing or breach of public trust" or other fundamental governmental misdeeds is especially deserving of constitutional protection. *See Connick,* 461 U.S. at 148 & n.8; *Givhan v. Western Line Consol. Sch. Dist.,* 439 U.S. 410 (1979) (public school teacher's protest of school's racially discriminatory practices protected under the First Amendment).[7] In case after case, the Court has explained that public employees must be free to speak on matters of public import without fear of retaliation because "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill,* 511 U.S. 661, 674 (1994) (plurality opinion); *accord Board of County Comm'rs v. Umbehr,* 518 U.S. 668, 674 (1996); *see also City of San Diego v. Roe,* 125 S. Ct. 521, 525 (2004) ("[P]ublic employees are . . . likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues.").

To silence a public employee who seeks to bring to light a problem in her workplace of public importance both eviscerates

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public employees be able to speak out freely without fear of retaliatory dismissal"); *Perry v. Sindermann,* 408 U.S. 593, 598 (1972) (teacher's public criticism of superiors on matters of public concern protected).

[7] Circuit court decisions reflect an overwhelming consensus that speech by public employees addressing government corruption, unlawful activity, misconduct, or waste is of distinct public concern and that "whistleblower speech," in particular, merits special protection. *E.g., Oladeinde v. City of Birmingham,* 230 F.3d 1275, 1292 (11th Cir. 2000); *Prager v. LaFaver,* 180 F.3d 1185, 1190-91 (10th Cir. 1999); *Feldman v. Philadelphia Hous. Auth.,* 43 F.3d 823, 829 (3d Cir. 1994). The circuits have found an even more significant public stake in such expression when, as here, it concerns law enforcement misconduct. *E.g., Guilloty Perez v. Pierluisi,* 339 F.3d 43, 52 (1st Cir. 2003); *Branton v. City of Dallas,* 272 F.3d 730, 740 (5th Cir. 2001).

that employee's personal interest in her own speech and subverts the public's interest in holding government officials accountable. Equally important, silencing a public employee impairs the employer's ability to manage itself and correct its own failings. *See City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 177 (1976) (restraining teachers' speech to board of education about school operations "would seriously impair the board's ability to govern the district"); *cf. Jackson v. Birmingham Bd. of Educ.,* 125 S. Ct. 1497, 1508 (2005) ("[T]eachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators."). In other words, the disclosure of the government's ills by those employees most familiar with them best serves the principle of *self*-government.

So essential is it that a public employee be at liberty to inform her employer of government misconduct—which often arises when an agency is acting *as sovereign* vis-à-vis third parties—or to comment within the workplace on other matters of public concern, that this Court has held that even when the expression is *private,* it enjoys First Amendment protection. *See, e.g., Rankin,* 483 U.S. at 386 & n.11; *Givhan,* 439 U.S. at 413-16; *see also Roe,* 125 S. Ct. at 526. As then-Justice Rehnquist wrote for a unanimous Court: "Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan,* 439 U.S. at 415-16.

B. This Court Has Never Held That Speech By Public Employees As Part Of Their Jobs Is Stripped Of First Amendment Protection From Workplace Retaliation.

Petitioners recognize that a fundamental purpose of the First Amendment is to foster free discussion of government affairs and promote informed self-government, Pet. Br. 10-13,

but insist that "speech expressed pursuant to ordinary job duties" does not advance these goals. *Id.* at 14. Their analysis, joined by the United States, does not withstand scrutiny.

1. In a series of decisions in the 1950s and 1960s, the Court held that public employers could not "require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated." *Connick,* 461 U.S. at 144 (citing cases). Building on those cases, the Court ruled in *Pickering* that the government also could not punish teachers for exercising their rights "*as citizens to comment on matters of public interest* in connection with the operation of the public schools in which they work." *Pickering,* 391 U.S. at 568 (emphasis added). The Court recognized, however, that public employees' free speech rights are not absolute and that the government's interests as an employer in regulating the speech of its employees differ from those it possesses in relation to the general citizenry. Thus, the Court identified the pivotal problem as "arriv[ing] at a balance between the interest of the teacher, *as a citizen, in commenting upon matters of public concern* and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (emphasis added).

"As citizens" and "as a citizen" cannot be read apart from the "commenting upon matters of public concern" language that follows to create an independent prerequisite that, to enjoy constitutional protection, an employee must be speaking in a "citizen" capacity outside his employment. By setting off "as a citizen" with commas, the Court revealed its meaning that teachers are like all other citizens in that they have an interest in commenting on matters of public concern. As the Court noted in *Waters,* "a government employee, *like any citizen,* may have a strong, legitimate interest in speaking out on public matters." 511 U.S. at 674 (emphasis added) (plurality opinion). Nothing in *Pickering* suggests that if the school board had circulated surveys to its teachers demanding their views about its performance on school-funding issues and then fired Pickering

for expressing a critical opinion in that survey, the Court would have denied him First Amendment protection outright because the message then would somehow not have been conveyed "as a citizen." The teacher's interest "as a citizen" in communicating his honest, personal opinion about the board's performance would have been no less if he had expressed it as part of his job rather than by writing a letter to the editor.

In ruling in favor of Pickering, the Court recognized that the teacher's statements were not directed toward a person with whom he would normally be in contact and did not threaten to undermine discipline by immediate superiors or harmony among coworkers. It noted that Pickering did not enjoy the kind of close working relationship with his employer for which personal loyalty and confidence are necessary for its proper functioning. 391 U.S. at 569-70. The Court commented that the teacher's statements could not be said to have impeded the proper performance of his job duties or to call into question his fitness to perform his duties. *Id.* at 572-73 & n.5. These observations by the Court do not suggest that any *one* of these factors—which are more likely to come into play when a public employee speaks in the course of doing his job—would, if present, have dictated a ruling for the school board as a matter of law. That the Court evaluated, as part of the balance, the relationship between the teacher's speech and his job duties underscored that such speech will often be related to, or even uttered as part of, those duties. That "the fact of employment [was] only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher," *id.* at 574, simply made balancing the competing interests that much easier. Far from drawing bright lines or erecting per se barriers to constitutional protection, the Court recognized "the enormous variety of fact situations in which critical statements by teachers and other public employees" may be made and accordingly did "not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." *Id.* at 569.

The First Amendment's prohibition on retaliation against employees for speaking on the job on matters of public concern was even more clearly demonstrated in *Givhan,* a case that both resembles this one and underlines the unworkability of a test that draws the First Amendment line at speech uttered as part of a public employee's job. The public-school teacher in *Givhan* was dismissed after meeting privately with the school principal to protest school employment practices she perceived to be racially discriminatory. 439 U.S. at 413. The Court held that such speech was constitutionally protected. According to the logic of the position taken by petitioners and the United States, the teacher's protest *must* have been expressed solely in her capacity as "citizen" or else it would have been unprotected. Yet nothing in the Court's discussion in *Givhan* turned on the capacity in which the teacher spoke. Indeed, if a wooden distinction had to be drawn, then the teacher was speaking as an employee concerned about "the impressions on black students of the respective roles of whites and blacks in the school environment," *Ayers v. Western Line Consol. Sch. Dist.,* 555 F.2d 1309, 1313 (5th Cir. 1977) (lower court decision in *Givhan*), who expressed her concerns to her principal in a series of encounters at the school. Viewed at the same level of generality as drafting a "disposition memorandum," such conferences would certainly be part of a teacher's job. Why would it not also be part of her job to root out race discrimination within her school, just as it was part of Ceballos's job to address suspected police misconduct in one of his cases? But more importantly, why could the teacher not be speaking *both* as an employee trying to improve her workplace *and* as a concerned citizen?

Indeed, the Court held in *City of Madison* that a teacher could not constitutionally be prohibited from speaking at a public school board meeting on the ground that he was not a union representative. The Court recognized that the teacher "addressed the school board not merely as one of its employees *but also* as a concerned citizen, seeking to express his views on

an important decision of his government." 429 U.S. at 174-75 (emphasis added). Yet it also observed that "it [was] not the case that [the teacher] was speaking 'simply as a member of the community.'" On the contrary, the teacher had opened his remarks to the board by stating that he represented an informal committee of 72 teachers in 49 schools. The Court emphasized that "he appeared and spoke *both as an employee and as a citizen exercising First Amendment rights.*" *Id.* at 176 n.11 (emphasis added). The two roles are not mutually exclusive.

The analytical flaws inherent in the argument advanced by petitioners and the United States become particularly evident when the facts of *Givhan* are changed slightly. Suppose that, instead of having only an implicit duty to oppose her school's racially discriminatory practices, the teacher was explicitly directed by an employee manual to work to eliminate race discrimination from her school. Or suppose Givhan had been hired as an ombudsman by the school district for the purpose of improving the schools' handling of racially sensitive matters. As petitioners and the United States would have it, the teacher's complaints to the principal in either variation would suddenly be robbed of constitutional protection. Nothing in *Givhan* or *Connick*, which reaffirmed Givhan's First Amendment "right to protest racial discrimination—a matter inherently of public concern," *Connick,* 461 U.S. at 148 n.8; *see also id.* at 146, supports such absurd results. *See Love-Lane v. Martin,* 355 F.3d 766, 771, 776-78 (4th Cir.) (assistant principal's complaints of race discrimination against students addressed matter of public concern, even though her "professional charge" was to raise awareness on minority issues), *cert. denied,* 125 S. Ct. 68 (2004).

The facts of this case, too, could readily be altered to underscore how untenable is the line petitioners and the United States would draw between speech that is per se unprotected and that which is presumptively protected. Suppose Ceballos's secretary found a draft of his then-uncirculated memorandum lying on his desk, and the secretary, on his own initiative, gave

it to Sundstedt and suffered retaliation as a result. Or suppose Ceballos learned that another prosecutor not under his supervision in the office suspected police misconduct in one of her cases and was reluctant to report it, so Ceballos took it upon himself to disclose it to Sundstedt. In either case, the disclosure would have fallen outside the speaker's job duties and would thus be transmuted, under the petitioners' and the United States' analysis, into "citizen speech."

Yet it is difficult to see why, if the messages in the hypotheticals were delivered in the same manner as Ceballos's statements were actually delivered, the employer's interest in retaliating against Ceballos in the case at hand would be any greater or its mission more threatened than in the hypotheticals. In fact, adopting such a distinction would encourage those public employees who are the most knowledgeable about a significant governmental breach to turn to uninformed proxies, who could not be accused of having spoken pursuant to an employment obligation, to convey controversial messages in their stead—diluting the employer's and public's right to be kept informed on matters of public import. While this Court recognized in *Givhan* that private expression in the workplace may "bring additional factors to the *Pickering* calculus," in that an employee's direct confrontation with his immediate superior can threaten the agency's institutional efficiency, depending on the "manner, time, and place" in which the message is delivered, 439 U.S. at 415 n.4, the Court did not suggest that the *source* of the information, rather than the mode and timing of its delivery, was controlling. *Cf. Bellotti,* 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

2. Petitioners and the United States rest their claim that this Court has imposed a separate "citizen capacity" prerequisite for First Amendment protection primarily on *Connick.* But what *Connick* adds to *Pickering* is an answer to the question whether a public employee is protected when she speaks as an

employee, and that answer is yes—so long as the employee is speaking on a matter of public concern and the interest in her expression is not outweighed by the employer's interest in the efficient performance of its public services.

In *Connick,* Sheila Myers, an assistant district attorney, was informed that she would be transferred to a different section of the criminal court. Strongly opposed to the transfer, Myers prepared a questionnaire soliciting the views of her colleagues concerning office transfer policy, office morale, confidence in supervisors, and whether employees felt pressured to work in political campaigns. 461 U.S. at 140-41. She distributed the survey at the office during work hours. *Id.* at 153 & n.13. Her employer deemed its distribution a "mini-insurrection" and an "act of insubordination" and discharged Myers. *Id.* at 141.

In analyzing whether Myers's questionnaire was constitutionally protected, this Court repeated the "as a citizen" phrase from *Pickering,* but in the context of drawing a distinction between speech that concerned "only internal office matters" rather than "a matter of 'public concern.'" *Id.* at 143. For example, the Court stated: "The repeated emphasis in *Pickering* on the right of a public employee *'as a citizen, in commenting upon matters of public concern,'* was not accidental." *Id.* (emphasis added); *see* Pet. Br. 22-23. As in *Pickering,* the "as a citizen" phrase was followed by "in commenting upon matters of public concern," emphasizing the distinction between employee speech touching on matters of public importance and employee speech concerning personal grievances or internal office policy.

That the Court was most focused in *Connick* on the public-personal distinction is buttressed by its observation that the "public concern" threshold is the same standard used for determining whether an action for invasion of privacy may be brought, *id.* at 143 n.5 (citing cases); *accord Roe,* 125 S. Ct. 525, a context in which the standard is purely content-driven. The Court described the threshold requirement as follows:

> We hold only that *when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest,* . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147 (emphasis added). Thus, far from establishing two distinct prerequisites to constitutional protection ("as a citizen" and "public concern"), the Court *equated* speech on matters of public concern with protected speech "as a citizen." Only "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community," do government officials "enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146. As in *Pickering,* the Court renounced the goal of establishing "a general standard" that would govern all cases. *Id.* at 154.

Turning to Myers's questionnaire, the Court focused on its "content, form, and context," *id.* at 147-48, not on Myers's capacity in circulating it. The Court held that, with one exception, the questions posed by Myers did not "fall under the rubric of matters of 'public concern.'" *Id.* at 148. Myers did not seek to inform the public that her office was not properly discharging its governmental responsibilities. She, in contrast to Ceballos, did not "seek to bring to light actual or potential wrongdoing or breach of public trust." *Id.* Instead, the Court found, the focus of her questions was "not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors," *id.*—again, in sharp contrast to Ceballos's statements, which were not made to further any personal grievance or agenda and did not even address his relationship with his employer.

Although the Court in *Connick* ruled that most of Myers's survey was unprotected, it found that one question about

pressure to work in political campaigns did touch upon a matter of public concern, *id.* at 149, and proceeded to balance Myers's interest in her speech against that of her employer, striking the balance in favor of the latter. *Id.* at 150-54. That the Court found one question to be of public concern severely undercuts the inflexible citizen/employee distinction urged by petitioners. According to petitioners and the United States, the Court implicitly found that Myers's questionnaire constituted "citizen speech" because it was not prepared pursuant to her prosecutorial duties. Pet. Br. 24; U.S. Br. 21 n.10, 25. Yet not only was the capacity of Myers's speech immaterial to the Court's analysis, but petitioners' and the United States' supposition begs the question, working backward from the result. The prosecutor's speech occurred on the job, during office hours, was communicated to her colleagues, and represented another salvo in a dispute with her employer over her employment conditions. If a rigid distinction must be drawn between speech in an "employee" versus "citizen" capacity, it is difficult to imagine speech more clearly expressed as an "employee" than that of the prosecutor in *Connick*, as the Court recognized in characterizing her survey as "an employee grievance concerning internal office policy." 461 U.S. at 154. And if Myers, a prosecutor, had sought to expose government wrongdoing or breach of trust, which the Court implied *would* have constituted a matter of public concern, *id.* at 148, she surely would have been speaking in the same capacity in which Ceballos, also a prosecutor, spoke when he did precisely that.

3. Nothing in the Court's public employee cases since *Connick* even hints that the Court has adopted a per se exclusion of constitutional protection for expression pursuant to a public employee's job duties. In its most recent decision in *Roe,* in which the Court held that a police officer's sexually explicit acts did not involve a matter of public concern, the Court expressly recognized that its public employee cases fell into two basic categories—one in which the speech relates to public employees' jobs and concerns issues on which they "are

uniquely qualified to comment," and one in which government employees "speak or write on their own time on topics unrelated to their employment." 125 S. Ct. at 523-24. Although petitioners and the United States would exclude from constitutional protection a great deal of expression arising in the first category, the Court recognized that *both* categories are protected absent a strong governmental justification. *Id.*

The petitioners' and the United States' reliance on *United States v. National Treasury Employees Union,* 513 U.S. 454 (1995) ("*NTEU*"), is misplaced. *See* U.S. Br. 17; Pet. Br. 27. In that case, the Court struck down a federal statute that broadly barred federal employees from accepting payment for their speeches and articles, regardless of whether the employee's expression or the group paying for it had any connection to the employee's official duties. The Court discussed the lack of "relevance to their employment" of most employee speech barred by the statute and the fact that plaintiffs could not even obtain compensation for their expressive activities "in their capacity as citizens, not as Government employees"—in the context of explaining why the government's interest in the ban was so weak. *NTEU,* 513 U.S. at 465. Because the barred speech generally had "nothing to do with their jobs" and did not "have any adverse impact on the efficiency of the offices in which they work," *id.*, the Court concluded that the government could not justify the sweeping prohibition "on the grounds of immediate workplace disruption asserted in *Pickering* and the cases that followed it." *Id.* at 470. The lack of a nexus between the speech and the workplace simply made the analysis easy. The Court never remotely suggested that *if* the ban had been limited to job-related expression, such speech *per se* would have failed the *Connick* threshold (though a more tailored ban likely would have been sustained for other reasons).

4. The briefs by petitioners, the United States, and petitioners' amici give the impression that the court of appeals' ruling rejecting a per se exclusion of constitutional protection for public employee statements made in the course of

performing job duties is an outlier, a decision out of the mainstream. Far from it. Taking their cue from this Court, virtually all of the circuits have held over the past 20 years, in accord with the Ninth Circuit, that speech by public employees on matters of public concern expressed as part of their jobs is constitutionally protected, subject to balancing under *Pickering*. Several of the circuits have issued multiple such decisions.[8]

Even in circuits tending to focus on whether a public employee spoke *primarily* as "a citizen" or as "an employee"—an inquiry that suggests the matter is not an either/or proposition—the courts have found that the employee spoke primarily as "a citizen" when she expressed views on a matter of public concern, whether or not as part of her job. *Bonds,* 207 F.3d at 980; *see, e.g., Kennedy,* 224 F.3d at 375-76; *Robinson v. Balog,* 160 F.3d 183, 188-89 (4th Cir. 1998); *Wilson,* 973 F.2d at 1269. Not even the Fourth Circuit, which has come closest to adopting the proposed per se rule, *see Urofsky v. Gilmore,* 216 F.3d 401 (4th Cir. 2000) (en banc), has consistently held that public employee expression that is part of the job is excluded from constitutional protection. *E.g., Love-Lane,* 355 F.3d at 771, 776-78; *Robinson,* 160 F.3d at 188-89 (public employees' required testimony before board on alleged misuse of public funds addressed matter of public concern).

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[8] A sampling includes *Fox v. District of Columbia,* 83 F.3d 1491, 1494 (D.C. Cir. 1996); *Baldassare v. New Jersey,* 250 F.3d 188, 196-97 (3d Cir. 2001); *Salge v. Edna Indep. Sch. Dist.,* 411 F.3d 178, 191 (5th Cir. 2005); *Kennedy v. Tangipahoa Parish Library Bd. of Control,* 224 F.3d 359, 367-75 (5th Cir. 2000); *Wilson v. UT Health Ctr.,* 973 F.2d 1263, 1269 (5th Cir. 1992); *Taylor v. Keith,* 338 F.3d 639, 644-45 (6th Cir. 2003); *Cockrel v. Shelby County Sch. Dist.,* 270 F.3d 1036, 1052 (6th Cir. 2001); *Delgado v. Jones,* 282 F.3d 511, 518-19 (7th Cir. 2002); *Bonds v. Milwaukee County,* 207 F.3d 969, 979-80 (7th Cir. 2000); *Kincade v. City of Blue Springs,* 64 F.3d 389, 396-97 (8th Cir. 1995); *Curtis v. Oklahoma City Public Sch. Bd. of Educ.,* 147 F.3d 1200, 1212 (10th Cir. 1998); *Oladeinde,* 230 F.3d at 1292 (11th Cir.); *see also* Br. in Opp. 11-18.

II. THERE IS NO REASON TO EXCLUDE PUBLIC EMPLOYEE SPEECH FROM FIRST AMENDMENT PROTECTION SIMPLY BECAUSE IT IS EXPRESSED AS PART OF THE EMPLOYEE'S JOB.

Petitioners and the United States offer two primary justifications for the drastic curtailment of fundamental and well-established First Amendment liberties they seek. First, they maintain that all speech by public employees when they are doing their jobs is "government speech" and thus without First Amendment protection. Pet. Br. 31-35; U.S. Br. 19-21. Second, they argue that recognizing constitutional protection for public employees' speech during the performance of their employment duties will hamstring public agencies in running their operations. Pet. Br. 35-40; U.S. Br. 21-23. Both rationales are untenable and would stifle a large quantity of speech on matters of public importance.

A. Richard Ceballos's Statements To His Supervisors Reporting Governmental Misconduct Were Not "Government Speech."

Relying on Judge O'Scannlain's analysis, the United States maintains that "'when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech,' and their speech is not *private* expression." U.S. Br. 19 (quoting Pet. App. 41). "Instead, their speech, 'in actuality,' is 'the State's.'" *Id.* (same). This assumption leads the United States to claim that public employee expression is akin to government-funded speech "because it is the government's message that is being conveyed and the government has in effect 'purchased' the speech." *Id.* at 20 (quoting *Urofsky,* 216 F.3d at 408 n.6); *see also* Pet. Br. 31-35. Apart from the fact that the First Amendment is concerned with more than protecting the personal interest of the speaker, *see* Part I.A., *supra,* the United States' argument is wrong on its own terms.

1. Public employees comprise a vast group about whom few categorical generalizations are possible. Yet it is obvious that many such employees (teachers, professors, prosecutors, judges, and scientists, to name a few) have a personal stake in their speech even though it occurs within parameters established by their employers or other superior authorities, such as under the terms of a research contract, pursuant to the curriculum set by the school board, in accordance with precedential case law or controlling ethical rules, etc.

The Court's recognition of public employees' broad discretion to think and speak their personal views has been most explicit in the academic freedom setting involving public university professors. *See, e.g., Sweezy v. State of New Hampshire,* 354 U.S. 234, 250 (1957) (plurality opinion) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."); *Wieman v. Updegraff,* 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) ("[U]nwarranted inhibition upon the free spirit of teachers . . . has an unmistakeable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice . . . ."). Although the government sets curricula, teaching standards, and other requirements, it does not dictate the exact direction in which its employees' spirit of exploration may roam. Teachers and professors have discretion in the manner in which they meet their employment requirements. Far from merely doing the government's bidding, the task of a university professor, for instance, is conceived primarily as one of disseminating his or her own personally developed views without interference from government. *See* Emerson, *supra,* at 594. If publicly employed teachers and professors had no personal interest in their speech, then they would have no constitutional basis for objecting to a requirement that they begin each class by praising the President of the United States.

That judges have a personal stake in their viewpoints is

equally evident. According to the United States' logic, the Justices of this Court have no personal interest in the speech in the memoranda they write one another, their comments at oral argument, or their weekly conferences because these are all routine facets of their employment responsibilities and thus constitute the government's own speech. To state the point is to refute it. As Professor Chafee put it: "The government pays judges, but it does not tell them how to decide." Zechariah Chafee, *The Blessings of Liberty* 241 (1956).

The same is no less true of prosecutors. For starters, a prosecutor has a tangible personal interest in what he says pursuant to his job duties because, "perhaps unique, among officials whose acts could deprive persons of constitutional rights," a prosecutor is "amenab[le] to professional discipline by an association of his peers." *Imbler v. Pachtman,* 424 U.S. 409, 429 (1976). It is not the DA's Office that is subject to discipline by the Bar, but the individual prosecutor himself. Moreover, "[t]he prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions." American Bar Association Standards for Criminal Justice, Prosecution Function, Standard 3-1.2(b) (3d ed. 1993); *see also Berger v. United States,* 295 U.S. 78, 88 (1935); *In re Ferguson,* 96 Cal. Rptr. 594, 598 (Cal. 1971). That a prosecutor is a public servant who prosecutes cases on behalf of "the People" of California, and not merely an agent of the DA's Office, makes his wise exercise of discretion that much more vital.

This Court has recognized that, far from performing a job consisting of a series of ministerial tasks, a prosecutor has broad discretion in carrying out his employment duties, that those duties "must be administered with courage and independence," and that a prosecutor "is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court." *Imbler,* 424 U.S. at 423, 424; *see also Gentile,* 501 U.S. at 1036 (plurality opinion) ("Our system grants prosecutors vast discretion at all stages of the criminal

process . . . ."); *Morrison v. Olson,* 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (discussing "the vast power and the immense discretion that are placed in the hands of a prosecutor"). The United States argues, however, that a prosecutor such as Ceballos is just doing his job when he steps forward and reports police misconduct. Accordingly, it essentially contends that Ceballos's speech has been dictated and compelled by his employment duties and hence is not susceptible to being chilled by the specter of employer retaliation. *See* U.S. Br. 25. Yet the very performance of the prosecutor's job entails so much discretion—much of it dependent on the individual prosecutor's personal views and judgment—that there is no guarantee that he will not be constrained by the risk of retaliation if he sticks his neck out and conveys an important message that may not be well received (such as suspicions that a police officer falsified an affidavit).

For precisely this reason, this Court has held that prosecutors are entitled to absolute immunity from liability in carrying out prosecutorial functions. *See, e.g., Imbler,* 424 U.S. at 424-25, 427 n.25 (explaining that a prosecutor could feel "constrained in making every decision" by the risk of personal liability and that such risk "also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation"); *see also Barr v. Matteo,* 360 U.S. 564, 571 (1959) (conferring absolute immunity against defamation on acting agency head because the threat of damage suits "might appreciably inhibit the fearless, vigorous, and effective administration of policies of government"). It seems odd, to say the least, for LA County and the United States to argue in most § 1983 and *Bivens* actions that government officials must have broad immunity so that they are not chilled in the exercise of their job functions, while maintaining here that public employees have no need for First Amendment protection for expressing their views on matters of public importance because they have no personal stake in their speech, but are merely

doing their jobs.

"[T]he threat of dismissal from public employment is . . . a potent means of inhibiting speech," *Pickering*, 391 U.S. at 574, at least as potent as the threat of a damages suit. Just because a prosecutor *should* step forward when he suspects police misconduct (whether or not it is *his job*, as the United States claims, to expose governmental misconduct, U.S. Br. 25) does not necessarily mean that he will. As this Court recently recognized: "Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied." *Jackson*, 125 S. Ct. at 1508.[9] The importance of the truth-seeking function of the criminal process was recently underscored in Southern California by the Rampart scandal. *See* Pet. App. 62 ("the code word 'Rampart' says it all"). Yet truthful speech is deterred by the threat of reprisals. Professor Chafee aptly observed: "[T]he governmental attack on the loud-mouthed few frightens a multitude of cautious and sensitive men . . . . We cannot know what is lost through the effect of repression on them, because it is not prosecuted but simply left unsaid." Chafee, *supra*, at 113. Prosecutors' very real fears "of being blackballed or labeled by officers and superiors who challenge their assessments," Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L.A. L. Rev. 545, 638 (2001), reflect the powerful institutional pressures that deter prosecutors from doing exactly what Ceballos did here. Such speech—unlike

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[9] *See also Umbehr*, 518 U.S. at 674 (threat of losing relationship with government "may chill speech on matters of public concern"); *Keyishian v. Board of Regents*, 385 U.S. 589, 683 (1967) ("It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living . . . ."); *cf. Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 (1990) (employees suffering adverse employment actions because of their political backgrounds "will feel a daily pressure" to join the prevailing political party).

commercial speech—is fragile, not "hardy," *Dun & Bradstreet*, 472 U.S. at 762, and is easily chilled by the risk of retaliation.

2. The special concurrence, the petitioners, and the United States maintain, nonetheless, that the government can control the content of its employees' speech because it has effectively "purchased" it, much as if the government had set the terms of a grant program. *See Rust v. Sullivan*, 500 U.S. 173 (1991). That the government pays the salary of the speaker does not necessarily mean, however, that every statement the speaker utters is "government speech." *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542-49 (2001) (speech by legal aid lawyers not "government speech" even though they are government-funded); *cf. People for the Ethical Treatment of Animals, Inc. v. Gittens*, --- F.3d ---, 2005 WL 1560336, at *3 (D.C. Cir. 2005) ("the thoughts contained in the books of a city's library" are not government speech even though "the library owns the books"). If all such speech were "government speech," many of this Court's public employee free speech decisions would have been easy victories for the agencies because the employees spoke on their employers' premises, usually during work hours. *See, e.g., Waters*, 511 U.S. at 664; *Rankin*, 483 U.S. at 381; *Connick*, 461 U.S. at 153 & n.13; *Givhan*, 439 U.S. at 412.

It is no answer for petitioners and the United States to argue, circularly, that only expression communicated "as part of the job" counts as the government's own speech because their theory—that the government owns its employees' speech because it pays their salaries—contains no such limiting principle. If the government speech argument had any force, it should be just as true that the government has "purchased" all employee speech that occurs on the premises and during work hours as that it has purchased speech communicated as part of the employee's job. The United States does not explain why the fact that employee speech is expressed as part of the job would trump the time and place of its delivery. If Ceballos had written his memorandum at home, at 11:00 p.m., on his own computer,

for instance, it is difficult to see why it would been more akin to "government speech" than Myers's distribution of her questionnaire in *Connick* at the office during work hours.

Likewise, the linkage to an express recommendation of a particular course of governmental action should not convert Ceballos's speech into that of the government. If Ceballos had changed the form of his memorandum so that, instead of recommending a disposition in one of his cases, he had simply reported suspected police misconduct to his superior (*e.g.*, "I am writing to inform you of the following police misconduct . . . ."), it would not be entitled to greater protection simply because it was a free-standing disclosure divorced from a proposed governmental response. In neither variation would the employee merely be expressing *the government's* message. *See Sons of Confederate Veterans, Inc. v. Commissioner of Va. Dep't of Motor Vehicles,* 305 F.3d 241, 245 (4th Cir. 2002) (opinion of Luttig, J.) (recognizing that "speech in fact can be, at once, that of a private individual and the government"); *Latino Officers Ass'n v. City of New York,* 196 F.3d 458, 468 (2d Cir. 1999) (observing that the *Pickering* and *NTEU* line of cases "makes plain [that] not all speech by a government agent is 'government speech' subject to such lenient analysis"). Although petitioners and the United States pay lip service to this Court's responsibility to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government," U.S. Br. 14 (quoting *Connick,* 461 U.S. at 147); Pet. Br. 24 (same), their all-encompassing "government speech" argument would deny First Amendment protection to public employee speech on matters of public importance for no reason *other* than that the expression occurred as part of the employee's job.

The fundamental flaw in the United States' and the concurrence's analysis is that the scope of a public employee's employment is much broader than those instances in which he is acting as a spokesperson for the government. That the government generally has the right to control the message communicated by its agents to the public has little bearing on

the communication of information *within* a prosecutor's office, from a subordinate prosecutor to his supervisor. Similarly, Judge O'Scannlain's citation to *Giglio v. United States,* 405 U.S. 150, 154 (1972), is inapt. Pet. App. 43. A prosecutor can bind the government in its dealings with third parties, as in *Giglio,* because the prosecutor is acting as a spokesman for the government. *See* Restatement (2d) of Agency § 272 (1958) ("[T]he liability of a principal is affected by the knowledge of an agent concerning a matter *as to which he acts within his power to bind the principal* . . . .") (emphasis added).

For that reason, the hypotheticals in the United States' brief (at 22) in which a prosecutor refuses to make a statement to the press directed by his employer or sabotages his employer's brief are easy. There, the public employee is actually speaking for his employer, *see, e.g., Kilgore v. Younger,* 180 Cal. Rptr. 657, 662 (Cal. 1982) (attorney general discharged an "official duty" when he called a press conference in his capacity as attorney general), and is being insubordinate in refusing to carry out his employer's instructions about how to perform his job function. In such a situation, the employer's interest in controlling its message, so as to perform its public services in the manner it sees fit and to maintain discipline, is nearly absolute.[10] An employer also could discipline an employee for violating office policy or a superior's directives regarding internal office communications. *See* U.S. Br. 23 n.11. Even the *Connick*

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[10] That authority is "nearly" absolute because a public employee would have a First Amendment interest in refusing to carry out an unlawful or otherwise invalid instruction. *See, e.g., Hensley v. Horne,* 297 F.3d 344, 346-48 (4th Cir. 2002) (city employee had free speech right to disobey instruction of his supervisor, then under investigation for sexual harassment, not to say anything negative to investigators); *Dill v. City of Edmond,* 155 F.3d 1193, 1200-02 (10th Cir. 1998) (police officer had First Amendment right not to falsify facts in police report); *see also O'Brien v. Town of Caledonia,* 748 F.2d 403, 406 (7th Cir. 1984) (holding police department policies prohibiting all criticism of the department overbroad and unconstitutional on their face).

dissent agreed that a public employee's refusal to perform a lawful task within the scope of his duties was "[p]erhaps the simplest example of a statement by a public employee that would not be protected by the First Amendment." 461 U.S. at 163 n.3 (Brennan, J., dissenting). The circuits have easily disposed of such cases under existing law.[11]

Petitioners' hypothetical First Amendment case brought by the White House press secretary fares no better. Pet. Br. 36. It is difficult to imagine a case in which the press secretary would have First Amendment protection for statements he made at his official press conferences. Not only is the press secretary speaking *for the President* when he holds press conferences, but as a high-level employee who enjoys a close, highly confidential relationship with the President, he can be fired at will for making statements that undermine that relationship. *See Waters,* 511 U.S. at 672 (plurality opinion); *Branti v. Finkel,* 445 U.S. 507, 517-18 (1980); *Pickering,* 391 U.S. at 570 & n.3.

By contrast, Ceballos did not speak for the government and was not insubordinate when he conveyed to his supervisor his personal assessment that police misconduct had occurred, recommended a particular course of action, and then awaited an answer—much as the teacher in *Givhan* conveyed her "personal opinions" regarding the school district's allegedly discriminatory practices. Pet. Br. 27. Contrary to the United States' view, U.S. Br. 21 n.10, that Ceballos developed his opinion in the course of doing his job does not make it any less his personal opinion. *See, e.g., Kincade,* 64 F.3d at 393, 397 (plaintiff gave oral report to city officials in his capacity as city engineer and that report represented "his own personal

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[11] *See, e.g., Wagner v. City of Holyoke,* 404 F.3d 504, 508 (1st Cir. 2005); *Lewis v. Cowen,* 165 F.3d 154, 164-65 (2d Cir. 1999); *Porter v. Dawson Educ. Serv. Coop.,* 150 F.3d 887, 894 (8th Cir. 1998); *Campbell v. Towse,* 99 F.3d 820, 829-30 (7th Cir. 1996); *Nelson v. Pima Cmty. Coll.,* 83 F.3d 1075, 1081 (9th Cir. 1996); *Wright v. Illinois Dep't of Children & Family Servs.,* 40 F.3d 1492, 1503-04 (7th Cir. 1994); *Berry v. Bailey,* 726 F.2d 670, 676 (11th Cir. 1984).

opinion"). Under the United States' theory, Ceballos's recommendation and Sundstedt's refusal would *both* be government speech. In fact, if a room full of prosecutors debated what should be done, *all* of their speech would be government speech, even if a multitude of inconsistent opinions were expressed and "the government" had not yet decided on its ultimate message.[12]

The petitioners' and United States' effort to peg Ceballos's statements as government speech ultimately fails because there was both no prescribed governmental message and no manner in which Ceballos's expression deviated from a governmental script. In government subsidy cases in which this Court has held that the government was entitled to control or influence the recipients' speech, the Court found that the government had made a particular "value judgment" and "chosen to fund one activity to the exclusion of the other." *Rust,* 500 U.S. at 192-93; *see also Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 544-45, 548-49 (1983). The Fourth Circuit's decision in *Urofsky* fits that same mold in holding that Virginia was entitled to set conditions on its employees' use of state computers. *Urofsky,* 216 F.3d at 404-05. As the Court explained in *Rosenberger v. Rector & Visitors of University of Virginia*: "When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." 515 U.S. 819, 833 (1995); *accord Velazquez,* 531 U.S. at 541; *Board of Regents of Univ. Wis. Sys. v. Southworth,* 529 U.S. 217, 229 (2000).

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[12] The Court's recent decision in *Johanns v. Livestock Marketing Ass'n,* 125 S. Ct. 2055 (2005), is distinguishable in this respect because there, the Court held that the government's beef promotions were compatible with its overall message of moderate consumption. *Id.* at 2063 n.5. Moreover, the challenged promotions were part of "the implementation of a 'coordinated program' of promotion, 'including paid advertising, to advance the image and desirability of beef and beef products.'" *Id.* at 2062-63. As discussed in text, there is no such programmatic governmental message here.

Here, no one has identified a government message that Ceballos contradicted or failed to promote, or, at a higher level of generality, what message *any* DA's Office might adopt that would be inconsistent with speech by a prosecutor trying to rectify what he perceived to be a material falsehood to a court in a criminal case. Would the message be that all criminal defendants are guilty? That police officers never lie? The true governmental message for a prosecutor would presumably be the motto inscribed on the U.S. Justice Department building: "The Government Wins When Justice is Done." Much like lawyers who work in a legal aid office, *see Velazquez,* 531 U.S. at 542-43, prosecutors are also hired to call them as they see them; rather than work from a government script, they make independent assessments of how to respond to the infinite variety of situations that might arise during the prosecution of a criminal case. No "programmatic message" is involved here any more than in *Velazquez*, *id.* at 548, and if there were such a message (*e.g.*, that prosecutors should keep their suspicions of police misconduct to themselves), it would subvert the functioning of the criminal justice system itself. *See id.* at 545.

Finally, this Court has relied on the notion that when the government speaks, whether to promote its own policies or advance a particular idea, "it is, in the end, accountable to the electorate and the political process for its advocacy." If the citizenry objects, it can elect new officials later to espouse a different position. *Southworth,* 529 U.S. at 235; *accord Velazquez,* 531 U.S. at 541-42. But when a public employer retaliates against its employee for exposing governmental misconduct, the political process breaks down. Indeed, it is not uncommon for agencies to fire or demote employees *before* they come out with their controversial reports to prevent the speech or discredit the speaker. *E.g., Campbell v. Arkansas Dep't of Corr.,* 155 F.3d 950, 954 (8th Cir. 1998); *Feldman,* 43 F.3d at 830. Neither the public nor the government itself can hold officials accountable for abuse unless public employees can disclose government misconduct without fear of reprisals.

B. Protecting Public Employees' Speech On Matters Of Public Concern Communicated As Part Of The Job Will Not Hamstring Public Agencies In Performing Their Public Missions.

Judge O'Scannlain's concurrence expressed the concern, echoed by petitioners and their amici, Pet. Br. 35-40; U.S. Br. 21-23; Nat'l School Bds. Ass'n ("NSBA") Br. 19, that if speech by public employees communicated as part of their jobs were not categorically excluded from constitutional protection, it would "'plant[] the seed of a constitutional case' in every task that every public employee ever performs." Pet. App. 43 (citation omitted). Two decades of actual experience by the lower courts presumptively protecting such speech should allay this fear. Both the *Connick* requirement that public employee speech address a matter of public concern and the *Pickering* balance work together to ensure that not every task can lead to a First Amendment case.

First, under *Connick,* whether speech is on a matter of public concern is not based solely on its content, but also on its form and context. 461 U.S. at 147-48. Ceballos agrees that the court of appeals went too far when it stated that "[i]t is only 'when it is clear that . . . the information would be of *no* relevance to the public's evaluation of the performance of governmental agencies' that speech of government employees receives no protection under the First Amendment." Pet. App. 10 (citation omitted). *Connick* foreclosed such an expansive conception of the "public concern" threshold. 461 U.S. at 148-49. Rather, "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *Roe,* 125 S. Ct. at 525-26. The reason for the threshold requirement is to eliminate internal workplace grievances from judicial scrutiny because "government offices could not function if every employment decision became a constitutional matter." *Connick,* 461 U.S. at 143. This Court need not

approve the Ninth Circuit's formulation for Ceballos to prevail.

Moreover, although the court of appeals and a number of other courts—correctly, in our view—have stated that "content" is the most important of the three factors, *see, e.g.*, Pet. App. 8; *Baron v. Suffolk County Sheriff's Dep't*, 402 F.3d 225, 233-34 (1st Cir. 2005); *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984); *cf. Connick*, 461 U.S. at 148 n.8 (race discrimination is "a matter *inherently* of public concern") (emphasis added), it does not necessarily follow that every statement by a public employee about government wrongdoing would meet the public concern threshold. For example, the context of the speech might demonstrate, as in *Connick*, that, taken as a whole, the employee's expression was intended more to provide further ammunition in a battle between employee and employer over some personal grievance than to address a matter of public concern. No such consideration is present here, however. Ceballos's reports of suspected police perjury lie at the core of First Amendment protection; his speech did not involve internal office affairs or the employment relationship itself; and petitioners do not dispute that his speech was on a topic of public concern, apart from his capacity in speaking. Thus, this case provides no occasion for this Court to refine the "public concern" analysis—even assuming that refinement were needed.

Liberally sprinkling the adjective "routine" throughout in characterizing Ceballos's expression does not heighten the government's interest in categorically barring from constitutional protection public employee speech that occurs as part of the job. *E.g.*, Pet. Br. 31, 32; Pet. App. 46. For starters, Ceballos's statements were far from routine. *See supra* pages 4-5 & n.1. More importantly, the term "routine" is unhelpful in drawing lines between protected and unprotected public employee speech. The frequency or regularity with which an employee performs a task—viewed at a high level of generality, such as "writing a disposition report"—says nothing about whether the employee is mouthing the "government's message" in performing the task and nothing about whether the employee

is speaking on a matter of public concern. As the court of appeals observed, "a report that would ordinarily be considered routine by virtue of its form may well become non-routine by virtue of its content, such as when it contains serious charges of official wrongdoing." Pet. App. 17. Suppose, for example, that a Capitol Police officer patrols the Capitol daily, looking for suspicious unattended packages, and every day she files a report with her findings. One day, the officer discovers a package containing a bomb; furthermore, after an investigation, she learns that a fellow police officer planted it. She reports her findings and is discharged. Similarly, imagine that a U.S. Customs Service employee learns that some of his colleagues have been accepting bribes from a foreign entity, known to have ties to terrorist organizations, to ignore certain shipments when they arrive at U.S. ports. He reports his discovery and is fired. In neither instance is there anything "routine" about the employees' reports, and it would be perverse to protect speech of such public significance *less* because the person *best* situated to alert his agency to the danger was the one who spoke.

As these examples highlight, the petitioners' invocation of the war on terrorism is unpersuasive. The government's efforts to prevent terrorism are *served*, not hindered, by protecting public employee free speech. *Contra* Pet. Br. 36-37. If the public employees in the best position to prevent an attack are chilled from coming forward with information for fear of reprisal, then the government's fight against terrorism will have been dealt a significant blow. Protecting such speech does not remotely "undermine[] the democratic process, by hindering the ability of politically accountable officials to run their agencies" or "encroach[] on the authority of the Executive Branch." U.S. Br. 22.[13] Rather, "when an employee exposes unscrupulous

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[13] In addition, the rights of federal employees to bring First Amendment claims under *Bivens* are already seriously circumscribed, *see Bush v. Lucas*, 462 U.S. 367 (1983)—even more so when national security is involved. *See, e.g., Edmonds v. DOJ*, 323 F. Supp. 2d 65 (D.D.C. 2004), *aff'd*, No. 04-5286

behavior in the workplace, his interests are co-extensive with those of his employer; both want the organization to function in a proper manner." *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986). It is not in any government agency's best interest "to fly blind" because its employees are afraid to report corruption or abuse. Unfortunately, however, officeholders sometimes act against the government's own genuine interests by retaliating against the bearers of bad news.

The United States contends, however, that to hold that a public employee has a presumptive right under the First Amendment to speak on matters of public concern in performing his job "is tantamount to holding that he has, at least in some circumstances, a federal constitutional right to perform his job as he sees fit." U.S. Br. 19; *see also* Int'l Muni. Lawyers Ass'n Br. 18. Its fears and those of other amici are vastly overblown. When employees refuse to follow their employers' lawful directives or otherwise fail to carry out their job responsibilities, their employers can discipline them; employers will continue to win those First Amendment cases when they are brought. *See supra* pages 37-38 & n.11.[14] Thus, if Ceballos had dismissed the *Cuskey* case despite Sundstedt's instruction to the contrary, his employer could have fired him. So, too, if Najera had forbidden Ceballos to turn over his memoranda to the *Cuskey* defense, and Ceballos defied that directive, his employer could have discharged him. In neither instance would Ceballos have had a meritorious constitutional claim. A Justice Department lawyer, directed to write a brief defending the constitutionality of school vouchers cannot write a brief opposing their validity—regardless of what he personally believes. In none of these instances would the employee have

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(D.C. Cir. 2005).

[14] Likewise, a publicly employed teacher or professor disciplined for refusing to follow the prescribed curriculum generally has no First Amendment claim. *See, e.g., Edwards v. California Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998).

a First Amendment right "to perform his job as he sees fit."

Selectively quoting from the court of appeals' opinion, the United States further argues that protecting a public employee in Ceballos's position will accord him preferential treatment vis-à-vis public employees who speak outside their employment capacity, precisely because "the speech was required by his job, since, in the view of the court of appeals, '[i]t is difficult to imagine how the [good-faith] performance of one's duties * * * could be disruptive or inefficient.'" U.S. Br. 24 n.12 (quoting Pet. App. 22). The United States' view is overly simplistic. Whether or not speech is "required" by one's job (as opposed to merely "part" of or "related" to one's job) is not so straightforward. Although Ceballos does not dispute that most of his statements were made as he performed his employment duties, *but see supra* n.5, it is not at all clear that anything he said was "required" by his job, especially given his broad discretion "to make sure the cases are handled appropriately," J.A. 100, and the absence of an office policy addressing his obligations in assessing whether police misconduct occurred. But more importantly, the United States omitted the key words "in this manner" from its quotation of the court of appeals' opinion. The court made no blanket assertion that the good-faith performance of one's duty could never be disruptive or inefficient. Its reasoning was entirely fact-driven and based on the optimal manner in which Ceballos presented his information to his supervisors and the absence of any suggestion that he had caused "disruption or inefficiency in the workings of the District Attorney's Office." Pet. App. 22.

Furthermore, Ceballos does not maintain that whenever an employee speaks on a matter of public concern in the course of performing his job duties, his speech automatically would survive a balancing test under *Pickering*. The United States is knocking down a strawman. The employee's assessment that misconduct had taken place might be recklessly false or so off-base as to call into question his judgment and fitness to perform his duties. *See Pickering*, 391 U.S. at 572-73 & n.5, 574-75;

Koch v. City of Hutchinson, 847 F.2d 1436, 1450-51 (10th Cir. 1988) (en banc). Moreover, as this Court has said, "the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin*, 483 U.S. at 388; *accord Connick*, 461 U.S. at 152-53. It is not the presumptive protection of on-the-job speech that would distort the balancing under *Pickering*, but the per se exclusion urged by petitioners and the United States. In balancing the employee's and employer's competing interests, a court is to consider "the responsibilities of the employee within the agency," *Rankin*, 483 U.S. at 390, and whether the speech "impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* at 388. That the impact of the speech on the employee's job obligations is evaluated under the *Pickering* balance *presupposes* that such expression will often be closely related to those obligations. Thus, if Ceballos had contacted the Sheriff himself or gone directly to the court or to defense counsel without first pursuing internal channels in the DA's Office, if he had ignored his supervisors' directives about how to proceed with the case, or if he had accused the Sheriff's Department of perjury in an open meeting, he would have been speaking on a matter of public concern within the scope of his job duties. In these variations, however, his employer would have a stronger argument that his speech was disruptive to the operations of the DA's Office, violated office policy regarding the chain of command, and/or undermined the DA's Office's working relationship with the Sheriff's Department. That Ceballos might still believe that he was engaged in "the good-faith performance of [his] duties" probably would not help him.

With that said, Ceballos agrees with the United States' contention that it may often be easier for a public employer to justify an adverse employment action in response to speech expressed in the performance of its employee's job duties. U.S. Br. 28-29. That is so not because a public employee carrying out his job duties has a lesser degree of First Amendment protection than other public employees, but simply because, as

the United States notes, if the employee were "performing his duties inadequately or inappropriately, that showing should be sufficient to defeat the constitutional claim." *Id.* at 28. Petitioners have not even attempted such a showing here.[15]

Finally, petitioners and the NSBA protest that if the Court recognizes First Amendment protection for speech pursuant to a public employee's job duties, public agencies will rarely be able to dispose of First Amendment claims at the pleadings stage, but will have to wait until at least summary judgment. Pet. Br. 36; NSBA Br. 21-22. There is certainly no contesting the proposition that denying constitutional protection for virtually all public employee speech will make it easier for public employers to dispense with such claims. The easy dismissal of First Amendment claims at the pleadings stage, however, has never been a goal to which this Court has aspired. Moreover, First Amendment retaliation cases are so fact-bound that they are rarely resolved before the summary judgment stage. This is true even in the Fourth Circuit, which has come closest to adopting the per se rule petitioners seek. *See, e.g., Birt v. Dorchester County*, 86 Fed. Appx. 593 (4th Cir. 2004) (affirming grant of summary judgment against public employee on ground that speech directly related to his duties); *Echtenkamp v. Loudon County Public Sch.*, 263 F. Supp. 2d 1043, 1058 n.11 (E.D. Va. 2003) (assessment whether speech was made as a "citizen" or as an "employee" "is highly factual

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[15] Inexplicably, the United States proposes that, if the Court recognizes that Ceballos's speech is not per se unprotected, it should vacate the court of appeals' judgment and remand to give petitioners the chance to develop a rationale under *Pickering* for retaliating against Ceballos for his speech. U.S. Br. 29-30. Although Ceballos agrees that a remand, as the court of appeals ordered, is appropriate to permit petitioners the opportunity to demonstrate that they did not retaliate against Ceballos for his speech, Pet. App. 26 & n.10, petitioners have forfeited the right to make a new argument under *Pickering* that their interest in disciplining Ceballos outweighed his interest in his expression—as the United States itself seems to concede. U.S. Br. 30. Even *petitioners* do not seek such a remand.

and contextual" and "must await a more complete record, either on summary judgment or at trial").

C. A Per Se Exclusion Will Create Perverse Incentives And Subject First Amendment Rights To Easy Manipulation By Public Employers.

Not only would a per se rule stripping constitutional protection from speech communicated pursuant to a public employee's employment duties curtail much expression by the individuals best situated to expose governmental misconduct and corruption, but it would create perverse incentives that could potentially be debilitating for public employers and employees alike. As the court of appeals and many other circuits have recognized, faced with a ruling that public employees enjoy First Amendment protection for their speech only if they speak outside their job responsibilities, many employees will feel compelled to take every accusation of wrongdoing directly to the press (whether overtly or through "leaks") instead of discreetly pursuing internal channels. Pet. App. 14; *see* Br. in Opp. 20-21 (citing cases). The disruption of government business by premature press involvement and the resulting scandals will be far greater than if employees felt free to report information to their supervisors without fear of reprisal, enabling problems to be more quickly and quietly resolved within the workplace.

The United States contends that the Court need not worry about creating an incentive for public employees to "go public," because employees are often prohibited from speaking to the press without their employers' permission. U.S. Br. 26. Why the United States believes this fact would be reassuring is unclear; if it violates office policy for the employee to go to the press, and he is afraid of retaliation if he reports misconduct internally, the end result may well be that "public employees [are deprived] of the ability to expose wrongdoing," *id.* at 24, *in any manner*. A ruling adopting a per se exclusion creates a trap for the public employee from which there is no escape: If he

reports government misconduct to his supervisor as part of his job, he lacks constitutional protection if his employer decides to retaliate; if he discloses the misconduct to the press, he faces discipline for evading internal channels of communication. *Lee v. Nicholl*, 197 F.3d 1291, 1296 n.1 (10th Cir. 1999); *see, e.g., Barnard v. Jackson County*, 43 F.3d 1218, 1223-25 (8th Cir. 1995); *Bartlett v. Fisher*, 972 F.2d 911, 917 (8th Cir. 1992); *Jurgensen v. Fairfax County*, 745 F.2d 868, 883-84 (4th Cir. 1984). The United States' position leaves the Court with nothing more than the vain hope that by some happenstance, a member of the general public or the press will stumble upon the important information and make it known.

The United States also attempts to reassure the Court that denying public employees constitutional protection for speech in the course of their job duties will not have devastating consequences because "there will likely be some statutory remedy" available to the employee who has appropriately performed his duties. U.S. Br. 25. This unsupported assertion is reminiscent of the long-discredited Holmesian conception that public employees have no First Amendment right to be free from retaliation. As a result of that view, "the government employee had few substantive or procedural protections, other than those accorded him by grace of the government in the civil service laws." Emerson, *supra*, at 564. The United States' argument is akin to saying that employees should have no equal protection claim when their state employer discriminates against them on the basis of race because they have a claim under Title VII or that the First Amendment is not necessary because state constitutions also protect freedom of speech. This Court has rightly refused to condition the availability of sacrosanct constitutional rights "on the vagaries of state or federal law." *Umbehr*, 518 U.S. at 680 (citation omitted).

Finally, a per se exclusion of constitutional protection for speech communicated as part of the public employee's job will invite manipulation by public employers to avoid liability. There is no doubt that employers would broaden their immunity

by the simple expedient of adding to their employees' reporting duties. *Wilson,* 973 F.2d at 1269; *accord Kennedy,* 224 F.3d at 370. The United States asserts, without support, that "it is likely" that public employers would simultaneously be broadening their exposure to other forms of liability, such as under civil service laws. U.S. Br. 26. But it is already the case that the federal government requires its employees to "disclose waste, fraud, abuse, and corruption to appropriate authorities." 5 C.F.R. § 2635.101(b)(11). Thus, under petitioners' and the United States' proposed per se rule, all federal employees are without constitutional protection when they report government misconduct "to appropriate authorities." Similar laws exist for some state and local government employees, *e.g.,* D.C. Code §§ 1-615.58(7) & 1-615.52(a)(6); Ga. Code Ann. § 45-10-1; NYC Charter, 9 RCNY § 1-03(a)(vi); Roseville (Cal.) Muni. Code § 3.15.040(B); Salt Lake County Code of Ordinances § 2.80.110(D), and more will surely follow if the Court adopts a blanket exclusion for speech uttered pursuant to job duties.

This Court refused to adopt a rigid rule excluding speech by independent contractors from constitutional protection in part to avoid leaving "First Amendment rights unduly dependent on . . . state law labels." *Umbehr,* 518 U.S. at 679. "Determining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government agencies concerned, . . . is an enterprise that we have consistently eschewed." *Id.* (citation omitted); *accord O'Hare Truck Serv., Inc. v. City of Northlake,* 518 U.S. 712, 722 (1996). This Court should decline to draw an equally formalistic distinction here.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed and the case remanded for further proceedings.

Respectfully submitted,

BONNIE I. ROBIN-VERGEER
Counsel of Record
SCOTT L. NELSON
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

HUMBERTO GUIZAR
MORENO, BECERRA, GUERRERO
& CASILLAS
3500 West Beverly Boulevard
Montebello, CA 90640
(323) 725-1151

Counsel for Respondent

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In The Supreme Court of the United States

GIL GARCETTI, FRANK SUNDSTEDT, CAROL NAJERA and COUNTY OF LOS ANGELES,

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

CINDY S. LEE
Counsel of Record
JIN S. CHOI
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Telephone (818) 545-1925
Facsimile (818) 545-1937

Office Of The County Counsel
RAYMOND G. FORTNER, JR., County Counsel
PHILIP S. MILLER, Assistant County Counsel
DORAINE F. MEYER, Senior Deputy County Counsel
500 West Temple Street
Los Angeles, California 90012-2713

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

Respondent touts the Ninth Circuit's approach which requires First Amendment protection for *all* public employee speech regarding matters of public concern, with no consideration of whether the speech was expressed strictly pursuant to job duties. This proposition is premised on the fundamentally flawed notion that the First Amendment "presumptively" protects all such speech expressed in an employment capacity. Resp. Br. 1. Respondent offers no persuasive explanation, however, of why this Court has repeatedly used the phrase "as a citizen" in describing the applicable rule for almost 40 years. *See*, Resp. Br. 20 (implausibly suggesting the Court had something different in mind because it "set[] off . . . 'as a citizen' with commas").

A close examination of respondent's discussion of the purported implications of this Court's prior opinions reveals critical deficiencies that undermine his primary contention that the disposition memorandum he prepared "expressing concern about the veracity of the officers in the case *pursuant to his duties as a prosecutor*"[1] (J.A. 396) is entitled to First Amendment protection simply because it addressed a matter of public concern. First, respondent cannot cite to any case law precedent that holds, let alone suggests, that *all public employee speech on a matter of*

[1] There is no merit to respondent's and the Association of Deputy District Attorney's ("ADDA") latent attempt to re-characterize the speech at issue as being "far from routine" and "extraordinary" by suggesting that evaluating the credibility of witnesses in a pending criminal case is not part of a prosecutor's duties if those witnesses happen to be police officers. Resp. Br. 4, ADDA Br. 24. Indeed, when asked whether in preparing the March 2 memo it was his intent to make accusations about any of the detectives involved in the *Cuskey* case, respondent replied: "My intent was to explain the reason for the dismissal or the request for a dismissal." J.A. 41. Moreover, at the time of his deposition, respondent certainly did not characterize other similar occasions where a prosecutor raised an issue of police misconduct as extraordinary, but rather, that it "happens quite a bit." J.A. 81.

public concern is constitutionally protected, even if it is expressed pursuant to job duties. Second, respondent has presented no meaningful rebuttal to this Court's recognition in *Pickering, Connick* and *NTEU* that speech "as a citizen" and First Amendment protection are inextricably linked. Third, respondent fails to demonstrate what core First Amendment interests are served by public employee speech expressed pursuant to job duties. Fourth, respondent makes no attempt to explain why it would be sensible for much, if not most, of what every public employee says or writes in carrying out his job duties to be presumptively protected by the First Amendment, such that the burden is on the employer to justify virtually every employment decision made thereafter.[2] Indeed, to do so would undermine both the historical evolution of the rights of public employees and the common sense realization that government offices could not function if every employment decision became a constitutional matter.

In the absence of any legal or historical justification for treating the key words "as a citizen" as surplusage, respondent contends that if public employees are not afforded First Amendment protection for *all* speech on matters of public concern, governmental whistleblowers will be silenced. This purported justification is unfounded because (1) whistleblower speech (expressed pursuant to routine job duties) makes up a microscopic percentage of the massive stream of public employee speech regarding matters of public concern; (2) First Amendment protection for whistleblowers whose speech is expressed *outside* the scope of their job duties (which is very often the case) would be triggered if the "as a citizen" threshold is

[2] According to respondent, his claim that "anything or almost anything [his supervisors] did was a form of retaliation because of [his] conduct in the *Cuskey* case" (J.A. 17) is sufficient to require his employer to justify every employment decision that, in respondent's view, was undesirable.

maintained; and (3) contrary to respondent's unsubstantiated assertions, whistleblowers enjoy ample federal and state statutory protection as well as civil service remedies[3] for retaliatory acts taken against them for whistleblowing activities – whether they occur within or outside the course and scope of employment.

The net effect of all of these deficiencies is a wholesale failure by respondent and his amici to provide any compelling case law support for their heretofore un-adopted proposition that public employees have an actionable First Amendment interest in all speech regarding matters of public concern, regardless of the role of the speaker at the time of the speech. Such case law support cannot be presented because it does not exist. This Court has consistently tied First Amendment protection to commentary, as citizens, on matters of public concern, and there is no viable reason for abandoning this construct.

I. RESPONDENT'S CONTENTION THAT ALL PUBLIC EMPLOYEE SPEECH ON MATTERS OF PUBLIC CONCERN SHOULD BE CONSTITUTIONALLY PROTECTED CANNOT BE RECONCILED WITH THE EVOLUTION OF PUBLIC EMPLOYEES' FIRST AMENDMENT RIGHTS.

Adherence to the most basic First Amendment principles and maintaining the vitality of this Court's emphasis on speech expressed "as a citizen" cannot be reconciled with what respondent proposes – requiring First Amendment protection for *all public employee speech on matters*

[3] Indeed, prior to filing the lawsuit, respondent pursued his civil service remedies through a formal grievance, and contrary to his suggestions, he communicated what he perceived to be retaliatory action by his supervisors externally to the Mexican American Bar Association hoping to gain support for his pending personal grievance. J.A. 144, 403.

of public concern.[4] The adoption of this simplistic litmus test will result in the wholesale deconstruction of the First Amendment analysis introduced in *Pickering v. Board of Education*, 391 U.S. 63 (1968) and further developed by its progeny. Respondent would have this Court essentially vanquish all references to the words "as a citizen" repeated in this Court's opinions for nearly four decades, thereby stripping away any hint of the underlying rationale for affording public employees protection under the Free Speech Clause.

A. Respondent Fails To Reconcile His Call For Sweeping First Amendment Protection With The Carefully Crafted Language In *Pickering*.

Respondent's contention that *all* public employee speech regarding matters of public concern should be constitutionally protected is irreconcilable with this Court's pronouncement in *Pickering* that the First Amendment is triggered only when public employees comment "as citizens" on matters of public concern. *Id.* at 568. Respondent attempts to deflate the meaning and effect of this key language by purporting to know what this Court intended to imply by placing commas around the words "as a citizen". Resp. Br. 20.[5] The focus on this

[4] Respondent concedes that the Ninth Circuit "went too far" in its expansive definition of what constitutes a "matter of public concern". At the same time, while recognizing that matters of public concern must be of "'general interest and of value and concern to the public'", respondent implausibly suggests that the only reason for this threshold "is to eliminate internal workplace grievances from judicial scrutiny". Resp. Br. 41, quoting from *City of San Diego v. Roe*, 125 S.Ct. 521, 525-26 (2004).

[5] At the same time, respondent does not address the fact that this Court *did not* set off the words "as citizens" with commas earlier on the same page. Indeed, this grammatical exercise is speculative and unpersuasive, especially since the language on its face is wholly unambiguous.

grammatical minutiae also underlines respondent's failure to address the implications of this critical passage which respondent quotes in bits and pieces. This passage clearly demonstrates that purely job-required speech does not implicate the fundamental First Amendment concerns that served as both the foundation and framework for the analysis and holding in *Pickering*:

> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights *they would otherwise enjoy as citizens to comment on matters of public interest* . . . it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. [Citations.] At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a *balance between the interests of the teacher, as a citizen*, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 568 (emphasis added). Respondent provides no concrete rationale for adopting a rule that would render this emphasis on citizen speech completely meaningless. Indeed, the core considerations in *Pickering* do not lend any support to respondent's contention that all public employee speech on matters of public concern must be constitutionally protected.[6]

[6] Respondent also does not and cannot explain how job-required speech, such as assessing and expressing the weaknesses of a pending criminal case (including the credibility of witnesses) in the disposition memorandum he prepared, advances the "core values" of the Free

(Continued on following page)

B. Respondent's Limited Case Law Analysis Disregards The Nexus Between Citizen Speech And First Amendment Protection.

The holdings, analysis, and key language in this Court's opinions cannot be reconciled with the Ninth Circuit's conclusion that all public employee speech regarding matters of public concern is presumptively protected under the First Amendment. This constitutional question has never been boiled down to this single factor, with no regard to the role of the speaker as an employee or a citizen. If this were true, this Court's repeated emphasis of the fundamental purposes of the Free Speech Clause and public employees' entitlement to express themselves "as citizens" would be wholly superfluous. Respondent does not dispute that these important considerations were integral to this Court's analysis throughout these opinions – opinions that do not logically give rise to his proposed First Amendment standard.

In addition to presenting no meaningful analysis of the key language in *Pickering*, respondent fails to address the true significance of *Connick v. Myers*, 461 U.S. 138 (1983), and in fact, distorts its holding. Respondent contends that this Court held that when public employees speak as *employees*, their speech is protected "so long as the employee is speaking on a matter of public concern" and the balance of competing interests weighs in their favor. Resp. Br. 24-25. In other words, if this were the case, *Connick* has already answered the precise question

Speech Clause or otherwise serves the fundamental purposes of the First Amendment. In fact, throughout the course of the litigation below, respondent maintained that "in an effort to fulfill his duties as a district attorney, [he] conducted an investigation of the matter and concluded there were serious problems with the warrant by which certain 'evidence' was obtained against one of the *People v. Cuskey* defendants." J.A. 386. Respondent also argued that granting the motion for summary judgment "would chill deputy district attorneys from performing their prosecutorial functions." J.A. 396.

presented for review in the instant petition, i.e., whether job-required speech on a matter of public concern is constitutionally protected. Clearly, this is not the case, regardless of respondent's mischaracterization of the holding in *Connick*.

Not surprisingly, respondent does not support this bold pronouncement with any follow-up analysis. Instead, respondent contends that the questionnaire that Myers circulated constituted "employee" speech because it was distributed to her colleagues "during office hours". Resp. Br. 27. The fact that the questionnaire was circulated in the workplace is not germane to the instant analysis; what is relevant is that the questionnaire was not expressed in Myers' capacity as an employee in that it was unquestionably *neither job-required nor circulated during the course and scope of her employment duties*. Thus, the fact that this Court found that one question in the questionnaire potentially gave rise to a First Amendment claim does not validate respondent's contention that all public employee speech, including job-required speech, is constitutionally protected just as long as it touches on a matter of public concern.[7]

Furthermore, respondent's cursory one-paragraph discussion of *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (*"NTEU"*) illustrates respondent's failure to reconcile his proposed standard with the continued vitality of the "as a citizen" element in this

[7] The National Treasury Employees Union's ("NTEU") discussion of *Connick* is equally misguided. At the conclusion of a confusing effort to explain away the reference to speech expressed "as a citizen", NTEU contends that whenever the subject speech relates to a "major issue of broad import", it should be characterized as "citizen speech". NTEU Br. 15. This contention – which is not supported by any authority – is nonsensical because it would render the words "as a citizen" (repeated in this Court's opinions since *Connick*) wholly meaningless. Furthermore, NTEU does not explain how any and all speech relating to matters of public concern, is by definition, citizen speech.

Court's First Amendment analysis. Resp. Br. 28. Present throughout the majority and concurring opinions in *NTEU* are repeated references to and discussions of the significance of speech engaged in "as citizens". These instructive comments cannot be reconciled with respondent's proposal which would make any inquiry along these lines irrelevant.

In *NTEU*, a federal statute prohibited federal employees from receiving compensation for any series of speeches or articles if they "directly related to the individual's official duties" and compensation for all individual speeches or articles even if they had "no nexus to Government employment." *Id.* at 473-74. The constitutionality of this honoraria ban was challenged by two unions and several career civil servants ("plaintiffs"). *Id.* at 461. The court of appeals affirmed the district court's granting the plaintiffs summary judgment, finding that the Government had not justified the burden imposed by the ban, in light of the "absence of evidence of either corruption or the appearance of corruption among lower level federal employees receiving honoraria *with no connection to their employment*". *Id.* at 463 (emphasis added).

This Court found that the challenged statute violated the First Amendment, and in doing so, reiterated fundamental First Amendment principles especially evocative of the analysis in *Pickering*. In fact, Justice Stevens began the substantive analysis of the majority opinion by remarking that "[f]ederal employees who write for publication in their spare time have made *significant contributions to the marketplace of ideas*." *Id.* at 464 (emphasis added). Justice Stevens further explained that the plaintiffs sought "compensation for their expressive activities in their *capacities as citizens*, not as Government employees"; that their "expressive activities ... fall within the protected category of *citizen comment on matters of public concern* rather than employee comment on matters related to personal status in the workplace"; and their activities "were addressed to a public audience, were made outside

the workplace, and involved content largely *unrelated to their government employment*." *Id.* at 464-66 (emphasis added).

These compelling comments unquestionably demonstrate the continued vitality of the "citizen speech" element of this First Amendment equation – powerful sentiments that were echoed by Justice O'Connor in her concurring opinion. Justice O'Connor explained that "the impact of the honoraria ban upon this class of employees' interests in *speaking out as citizens, rather than as employees, cannot be gainsaid*." *Id.* at 482 (emphasis added). Thus, *NTEU* demonstrates that the question of whether the subject speech was expressed "as a citizen" is one that must still be answered in conducting this First Amendment analysis. Under respondent's approach, however, there is no need to either ask or answer this fundamental question.[8]

Having failed to demonstrate how *Pickering, Connick* and *NTEU*, either individually or collectively, contain analysis that validates his proposed rule on any meaningful level, respondent relies, in misguided fashion, on the purported implications of the facts and holding in *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979), another case involving a public school teacher. Respondent asserts that *Givhan* "clearly demonstrated" the "First Amendment's prohibition on retaliation against

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[8] The constitutional boundaries drawn in *NTEU* are analogous to the lines that should separate job-required speech from citizen speech and those that have been drawn for government-subsidized speech. In these settings, this Court has recognized that the protections of the First Amendment are inextricably tied to private expression. *See, Rust v. Sullivan*, 500 U.S. 173, 198-99 (1991) ("The regulations, which govern solely the scope of the Title X project's activities, *do not in any way restrict the activities of those persons acting as private individuals.*") (emphasis added). Just as the First Amendment does not entitle those employed at a federally-subsidized family planning project to ignore the restrictions upon which the funding is based, the First Amendment should not protect public employee speech necessitated by the duties of public employment.

employees for speaking *on the job* on matters of public concern". Resp. Br. 22 (emphasis added). This assertion is misleading because (1) the subject speech was not expressed pursuant to Givhan's job duties; and (2) this Court's analysis and holding did not come close to intimating that the First Amendment protected "on the job" speech related to matters of public concern.[9]

The question resolved in *Givhan* was that a public employee enjoys First Amendment protection even if the subject speech is expressed in a private conversation. This holding made sense because speech expressed "as a citizen" does not necessarily have to be communicated in a public forum. First Amendment protection should not be lost where employees choose to express themselves as citizens away from the public's eye. Moreover, in examining Givhan's speech, this Court commented that "[w]e are unable to agree that private expression of one's views is beyond constitutional protection" and that a public employee enjoys constitutional protection "if he decides to express his views privately rather than publicly." *Id.* at 413. This language, especially the use of the word "views", certainly suggests that Givhan was not performing her job duties when she engaged in the subject speech. In fact, contrary to respondent's suggestion that Givhan's speech was found to be constitutionally protected "employee" speech, this Court explained in *Connick* that Givhan "[spoke] out *as a citizen* on a matter of public concern, not tied to a personal employment dispute. . . . " *Connick*, 461 U.S. at 148 n. 8 (emphasis added).

[9] The NTEU contends that there is a "long-standing framework under which both work-related and work-required speech on matters of public concern are weighed under the *Pickering* balance." NTEU Br. 4. The NTEU, however, provides no explanation as to where "work-required speech" has been found to be constitutionally protected by this Court (and therefore subject to *Pickering* balancing) and how work-required speech can be characterized as speech expressed "as a citizen".

Thus, respondent's limited analysis of this Court's prior opinions fails to demonstrate even a semblance of the legal foundation necessary to justify his contention that *all public employee speech* regarding matters of public concern should be presumptively protected, thereby automatically shifting the evidentiary burden to the employer to justify any subsequent employment decision that an employee perceives as being retaliation. In pressing for this truncated First Amendment standard, respondent either ignores or dismisses at-hand the significance in this calculus of public employee speech expressed "as citizens" and the direct relationship between the scope of First Amendment protection and the fundamental purposes of the Free Speech Clause. Indeed, the overall guidance and analysis provided by this Court in the last 40 years will be rendered toothless if the standard is reduced to what respondent seeks. This Court's efforts should not be allowed to fall victim to such a drastically revisionist and unjustifiable overhaul.[10]

II. EXAGGERATED CONCERNS ABOUT SILENCING WHISTLEBLOWERS DO NOT JUSTIFY DRAPING ALL JOB-REQUIRED SPEECH ON MATTERS OF PUBLIC CONCERN WITH FIRST AMENDMENT PROTECTION.

Respondent attempts to justify his proposed First Amendment standard of protecting all public employee

[10] The ever-growing diversity of forums in which public employees may comment, as citizens, on matters of public concern demonstrates that this Court's analysis is as relevant as ever. From personalized webpages to podcasting to blogging to more traditional forums of expression, public employees certainly have a myriad of avenues to exercise their rights, as citizens, to contribute to the free marketplace of ideas. The First Amendment, which first and foremost, protects speech in those forums, should not be manipulated to "constitutionalize" speech necessitated by job duties and unmotivated by the desire to express oneself as a citizen.

speech touching on matters of public concern with the purported need to provide constitutional protection to public employees who "discover, disclose, and correct abuses of power" and communicate "information about abuses of authority, violations of law, or gross mismanagement by the government. . . . " Resp. Br. 12, 13. The Government Accountability Project ("GAP") and the NTEU raise arguments in the same vein, asserting that without First Amendment protection, government workers will not expose misconduct and corruption, even if such exposure is required by their regular job duties. Their effort to justify the lowering of the threshold for First Amendment protection with dire predictions about the suppression of governmental whistleblowers is fundamentally flawed in many respects.

First, in focusing on this very narrow part of the public employee speech spectrum, respondent and amici neglect to address the indisputable fact that under their proposed standard, *all* public employee speech regarding matters of public concern will be constitutionally protected, not just speech that exposes misconduct and corruption. Their speculative concerns about protecting this very small portion of public employee speech do not justify the adoption of a standard that could constitutionally protect all job-required speech that happens to touch on matters of public concern. Indeed, job-required speech with no whistleblowing aspects makes up the overwhelming majority of the immense and continuous stream of public employee speech.

Second, and conversely, respondent and amici cannot dispute that the whistleblower speech about which they are so concerned constitutes a miniscule fraction of all public employee speech relating to matters of public concern. Indeed, out of this country's 21 million public employees, relatively very few are employed to investigate and expose governmental misconduct, let alone misconduct of any kind. When these employees expose misconduct, pursuant to their job duties, they cannot and should

not be viewed as having done so "as citizens". On the other hand, public employees who expose misconduct, through either internal or external channels and *outside* the scope of their job duties, should be entitled to First Amendment protection subject to the *Pickering* balancing.[11]

Third, respondent and amici base their warnings about the suppression of job-required whistleblowing speech on a disturbing and unsubstantiated assumption – that public employees who are tasked with the duty of investigating and exposing misconduct will not do so absent First Amendment protection. For instance, NTEU argues that "public employees, armed with their specialized expertise and data or other insights resulting from their work, have served the public interest by exposing wrongdoing or waste of government funds . . . in contexts that involve the performance of their duties . . . ", with the implication being that without First Amendment protection, these duties will not be performed. NTEU Br. 3. This contention is echoed by the GAP which contends that without First Amendment protection, government workers will do nothing when they discover misconduct while "carrying out their job duties." GAP Br. 13-14.

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[11] For example, although not part of his normal job duties, an emergency room doctor at a county hospital complains about systemic inefficiencies to a supervising administrator and is subsequently discharged. This doctor would have a viable First Amendment claim subject to the *Pickering* balancing if he claims his termination was due to his speech. Compare this example with others that demonstrate that public employees who uncover misconduct, pursuant to their job duties, do not express themselves as "concerned citizens": (1) an SEC investigator reports that a major corporation misreported its earnings; (2) a state investigator reports that a nursing home does not comply with various health code regulations; and (3) an EPA investigator reports that an oil refinery has not met recently enacted anti-pollution requirements. Nevertheless, under respondent's proposed approach, each of these scenarios (none of which implicates the core values of the First Amendment) involves constitutionally protected speech.

Their assumption that government workers will forego their job obligations, absent First Amendment protection, is counter-intuitive and unfounded, as demonstrated by their own example: the Rampart police corruption scandal involving a group of Los Angeles Police Department officers and the ensuing criminal prosecution. Notwithstanding their suggestion that the "Rampart scandal may never have come to light" but for the "persistence and willingness to speak out about this misconduct" (ADDA Br. 11), the fact of the matter is that several police officers were prosecuted, and it is inconceivable that the prosecutors involved, when carrying out their job duties in good faith, were somehow comforted by the knowledge that all of their speech in connection to their investigation was protected by the First Amendment. Indeed, the fact that the prosecutors were tasked with investigating and prosecuting police officers in a highly-politicized climate, and performed their obligations, undercuts respondent and amici's contention that without First Amendment protection for such job-required speech, such speech will be silenced. Thus, respondent's doomsday-like warning that government workers will not investigate and expose misconduct, despite being required to do so by their job duties unless given First Amendment protection, should be rejected outright.

Finally, governmental whistleblowers, regardless of whether they expose misconduct within or outside the scope of their employment duties, have remedies available for employment actions they perceive as being retaliatory, not only under state and federal whistleblowing statutes but also common law torts as well as civil service procedures. Respondent and amici summarily characterize the whistleblowing statutes as being completely ineffectual but offer no persuasive explanation of why these laws,

which reflect legislative views on the best way to protect on-the-job speech that exposes government wrongdoing or waste, are not adequate to the task. *See, e.g.*, Resp. Br. 49 (relying on statement in book written 35 years ago that public employees have "few" statutory protections).[12] Painting these statutes with such broad and inaccurate strokes cannot be justified, and neither can the manipulation of the threshold for First Amendment protection to constitutionalize speech with no nexus to the core values of the Free Speech Clause. Indeed, protecting all public employee speech regarding matters of public concern – including job-required speech with no element of citizen speech – would result in an unjustifiable trivialization of the true meaning and scope of the First Amendment.[13]

[12] Indeed, their criticisms about the purported inefficacy of whistleblowing statutes inappropriately downplay their significance, while also ignoring the fact that these laws *do protect* government employees who expose misconduct, either pursuant to or outside the scope of their job duties. Furthermore, legislatures throughout this country enacted these statutes after extensive debate and deliberation by their respective members. This Court should allow any purported statutory deficiencies to be addressed by the appropriate legislative body, as opposed to rendering these statutes effectively obsolete by adopting respondent's all-inclusive approach of constitutionally protecting *all* public employee speech regarding matters of public concern.

[13] In *City of San Diego v. Roe*, this Court rejected the Ninth Circuit's similarly open-ended approach used to find that a police officer's sales and marketing of "sexually explicit videos for profit" on the internet "fell within the protected category of citizen commentary on matters of public concern." *Roe*, 125 S.Ct. at 523. This Court found that "Roe's expression does not qualify as a matter of public concern under any view of the public concern test", and therefore, the balancing under *Pickering* was not required. *Id.* at 526. Just as the Ninth Circuit's definition in *Roe* of what constituted a matter of public concern trivialized the true meaning and scope of the First Amendment, so does the Ninth Circuit's position that *all* public employee speech regarding matters of public concern be constitutionally protected.

III. RESPONDENT HAS NOT AND CANNOT SET FORTH ANY SOUND POLICY RATIONALE FOR REQUIRING PUBLIC EMPLOYERS TO SHOULDER THE HEAVY BURDEN OF JUSTIFYING EMPLOYMENT DECISIONS MADE FOLLOWING JOB-REQUIRED SPEECH ON MATTERS OF PUBLIC CONCERN.

While respondent exaggerates the concerns about the silencing impact that precluding First Amendment protection for job-required speech would have on whistleblowers, he trivializes the crippling effect on the public employer's ability to provide public services if all employee speech is cloaked with First Amendment protection. Respondent maintains that since First Amendment-based retaliation claims are by their very nature fact-intensive, cases are "rarely resolved before the summary judgment stage." Resp. Br. 47. Respondent's acknowledgment of this litigational reality actually reinforces petitioners' contention that triggering First Amendment protection only upon an allegation that the speech related to a matter of public concern would dramatically increase the volume of First Amendment cases – none of which can be dismissed prior to summary judgment. This will undoubtedly have a substantial impact on the operation and efficiency of government employers throughout this country as employment-based civil rights actions brought by public employees are burdensome to defend, disruptive to the working environment and often associated with large jury awards.

Public employers need some certainty and predictability with regard to employment decisions if they are to efficiently and effectively perform public services through their employees. Respondent's proposed standard undermines these practical realities by subjecting public employers to the constant fear of protracted First Amendment litigation. Indeed, the rule advocated by respondent would, to a large degree, effect an across-the-board constitutionalization of the relationship between

public employees and their employers. Because employment actions are routinely taken in response to something the employee has said or written, and because a very large proportion of what public employees say and write in carrying out their jobs touches on matters of public concern, an untold number of employment disputes will turn into constitutional cases filed in federal court if respondent's view prevails.

It may well be, as respondent and amici suggest, that the employer would be able to prevail under the *Pickering* balancing test in most cases, but the cases would nevertheless have to be vigorously defended. Litigating suits in federal court takes time and money, which would otherwise be spent on doing the things that government agencies exist to do (namely, serving the public). *Pickering* and *Connick* contemplated First Amendment litigation in the relatively rare circumstances where an employment action was taken on the basis of extracurricular speech. Under respondent's view, First Amendment litigation would be the rule, not the exception.

Moreover, the *Pickering* balancing provides little consolation to the government employer defending against meritless claims that cannot be dismissed at the summary judgment stage, as in this case.[14] A finding of a triable

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[14] While the district court in this case did not address the merits of the other grounds for granting petitioners' summary judgment motion (P.A. 66 n. 6), the Ninth Circuit nevertheless rejected petitioners' evidence of non-retaliatory reasons and concluded that there was no suggestion of "disruption or inefficiency in the workings of the District Attorney's Office" (P.A. 22) even though the record demonstrated that the disposition memorandum (1) was directed to supervisors to whom he normally had contact with; (2) affected his working relationship with his coworkers in that, according to respondent, deputy district attorneys would not talk to him anymore or "deal with [him]" (J.A. 95, 122-23) and there was a noticeable source of friction between respondent and his supervisors due to the stance respondent took in the *Cuskey* case (J.A. 122-23, 414); and (3) called into question respondent's fitness to prosecute cases involving the sheriff's station that employed

(Continued on following page)

issue on a single material fact will prevent the summary dismissal of an action. The probability of such a result in any given case is magnified by the numerous evidentiary and legal vagaries that accompany summary judgment motions, and, as respondent recognizes, the factually intensive nature of First Amendment-based retaliation claims in general. Furthermore, cases will often not end with the granting of summary judgment since plaintiffs can and will exercise their right to appeal, thereby invariably causing further significant financial and operational burdens.

Not only is the *Pickering* balancing anything but a sure-fire method of defeating meritless First Amendment claims prior to trial, under the Ninth Circuit's view, it will hardly be available, if at all, when job-required speech is involved. *See* P.A. 22 ("It is difficult to imagine how the performance of one's duties in this manner could be disruptive or inefficient. . . . "). According to the Ninth Circuit, therefore, when an employee engages in speech pursuant to his job duties, the employer would have a harder time justifying its employment decisions to prevail under *Pickering*. Even respondent recognizes the fallacy of

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the deputies respondent accused of misconduct in his memorandum. (According to respondent, after the new administration came into office about the first week of December 2000, the new head deputy in Pomona who replaced Sundstedt was of the view that respondent should not go back to Pomona because he did not think law enforcement would approve it and that respondent should not file any cases involving that particular sheriff's station.) J.A. 94. Moreover, unlike in *Pickering*, the employee-employer relationship in this case required personal loyalty and confidence for its proper functioning. However, as far as respondent was concerned, he lacked confidence that the district attorney's office, and in particular, his supervisor Sundstedt, would comply with *Brady* and as such, respondent "took it upon [him]self" to fax a copy of his memos to another defense attorney on another case and advised him that there had been prior allegations involving the same deputies. J.A. 89-90, 439.

the Ninth Circuit's reasoning, acknowledging that if the fact of employment is only tangentially involved in the subject matter of the speech, the balancing favors the employee (Resp. Br. 21); conversely, "it may often be easier for a public employer to justify an adverse employment action in response to speech expressed in the performance of its employee's job duties." Resp. Br. 46. This dichotomy makes sense since the employer's interests are heightened vis-à-vis the employee when the employee engages in job-required speech, and the employee's interests are heightened vis-à-vis the employer when the employee engages in citizen speech. Adopting the Ninth Circuit's approach will therefore engender an additional incongruous effect – precluding public employers in most cases involving job-required speech from prevailing under the *Pickering* balancing test.[15]

Thus, constitutionally protecting all public employee speech touching on matters of public concern will have a series of deleterious effects, both in the courtroom and in the workplace. The inevitable increase in the volume of First Amendment-based retaliation claims, combined with the unpredictable nature of the results of the *Pickering* analysis conducted at the summary judgment stage, will cause a tremendous drain on limited government and judicial resources. Moreover, the increased possibility of First Amendment litigation in every government office and all the attendant considerations will weigh heavily on personnel-related employment decisions that must be

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[15] For this reason, if this Court were to find that the First Amendment protects all public employee speech regarding matters of public concern, this case should be remanded to allow a proper *Pickering* balancing analysis to be conducted – one in which the balancing is weighed in favor of petitioners since respondent's speech was expressed pursuant to his job duties.

made to maintain and improve the efficiency of the services provided to the public. In many instances, necessary employment actions may be delayed or not be taken altogether due to these considerations. These unwelcome consequences should be avoided especially since the Ninth Circuit's approach does nothing to promote the fundamental purposes of the Free Speech Clause or to limit First Amendment claims to those based on speech expressed "as a citizen" on matters of public concern.

CONCLUSION

For the reasons stated above and in petitioners' opening brief, the judgment of the court of appeals should be reversed.

Dated: August 25, 2005.

Respectfully submitted,

CINDY S. LEE*
JIN S. CHOI
FRANSCELL STRICKLAND, ROBERTS & LAWRENCE
100 West Broadway, Suite 1200
Glendale, California 91210-1219
(818) 545-1925

Office of the County Counsel
RAYMOND G. FORTNER, JR., County Counsel
PHILIP S. MILLER, Assistant County Counsel
DORAINE F. MEYER, Senior Deputy County Counsel
500 West Temple Street
Los Angeles, California 90012-2713

Attorneys for Petitioners
**Counsel of Record*

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No. 04-473

IN THE
SUPREME COURT OF THE UNITED STATES

GIL GARCETTI, *et al.*,
Petitioners,

v.

RICHARD CEBALLOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR ELAINE MITTLEMAN AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

ELAINE MITTLEMAN
2040 Arch Drive
Falls Church, VA 22043
(703) 734-0482

Counsel for Amicus Curiae

In the Supreme Court of the United States

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MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF FOR ELAINE MITTLEMAN AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Elaine Mittleman respectfully moves for leave to file out of time the Brief for Elaine Mittleman as *Amicus Curiae* in Support of Neither Party. Doraine F. Meyer, Senior Deputy County Counsel, County of Los Angeles, a counsel for petitioner, advised undersigned counsel that the County Counsel's Office does not consent to this motion. Cindy S. Lee, counsel for petitioner at oral argument, did not return the telephone calls of undersigned counsel. Bonnie I. Robin-Vergeer, counsel for respondent, has indicated that respondent takes no position on this motion.

Amicus curiae, Elaine Mittleman, is an attorney with a solo practice and is a member of the Supreme Court Bar. She has a long-standing interest in protection of First Amendment rights for federal employees. In her first job after graduating from the University of Michigan Law School, Ms. Mittleman was terminated from her position on the Chrysler Loan Guarantee Board staff at the United States Treasury after raising concerns about Chrysler's financial reporting. She was accused of leaking to the press and presenting a risk of damaging news leaks.

Ms. Mittleman attended the oral argument conducted in this case on October 12, 2005, and was troubled by the failure of the Office of the Solicitor General to make distinctions between the caselaw for federal employees as compared to state, county and municipal employees. and failed to provide information about pertinent statutes, such as the Civil Service Reform Act and the Whistleblower Protection Act.

Following oral argument, Ms. Mittleman wrote a letter dated October 17, 2005, to Solicitor General Paul D. Clement, in which she set out her concerns about the arguments presented by the Solicitor General in its brief, including the failure to provide information about pertinent statutes, such as the Civil Service Reform Act and the Whistleblower Protection Act. She received a letter dated November 18, 2005, from James F. Bellot, Acting Executive Officer. The letter stated that the government's brief accurately and appropriately provided the necessary information on the position of the United States concerning the First Amendment issues at stake and their relevance in the federal employment context. The letter further stated that the

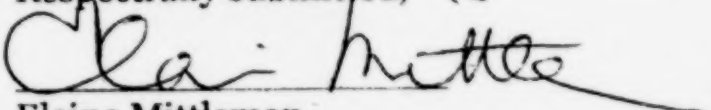
case does not involve the interpretation of the federal statutes Ms. Mittleman discussed in her letter.

Ms. Mittleman has now reviewed the United States Brief in *Whitman v. U.S. Department of Transportation*, No. 04-1131, which presents a question involving the interaction between constitutional claims and the Civil Service Reform Act. She submits that the positions taken by the United States in the *Garcetti* and *Whitman* cases may not be fully consistent. This conflict may only generate further confusion in the jurisprudence of constitutional protection for federal employees.

This Court has ordered reargument in the *Garcetti* case. Accordingly, Ms. Mittleman has prepared the attached *Amicus Curiae* Brief, which describes the confusion in the caselaw, noting the distinctions between federal and municipal employees, and in the positions taken by the United States in the *Garcetti* and *Whitman* cases. She respectfully submits that this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties.

Wherefore, Ms. Mittleman respectfully requests that the Brief for Elaine Mittleman as *Amicus Curiae* in Support of Neither Party be permitted to be filed out of time.

Respectfully submitted,



Elaine Mittleman
2040 Arch Drive
Falls Church, VA 22043
(703) 734-0482

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In the Supreme Court of the United States

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR ELAINE MITTLEMAN AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF THE *AMICUS CURIAE* [1]

Amicus curiae, Elaine Mittleman, is an attorney with a solo practice and is a member of the Supreme Court Bar. She has a long-standing interest in the protection of First Amendment rights for federal employees.

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[1] The petitioner has not consented to the filing of this brief. The respondent takes no position on the filing of this brief. No attorney for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, made any monetary contribution to the preparation or submission of this brief.

In 1980, Ms. Mittleman worked at the U.S. Department of the Treasury on the Chrysler Loan Guarantee program after graduating from the University of Michigan Law School. She was interested in the Chrysler Loan Guarantee because of her background in the auto industry, having earned an M.S.I.A. at Carnegie-Mellon and worked at Ford Motor Company on Finance Staff before attending law school.

In her job at Treasury, Ms. Mittleman raised concerns about the Loan Guarantee Board's monitoring of Chrysler's financial condition, which was quite precarious. After she expressed those concerns, including speaking to persons on Capitol Hill, such as Representative David Stockman, she was terminated from her position by Assistant Treasury Secretary Roger C. Altman. Ms. Mittleman's speech about Chrysler's compliance with the requirements under the Loan Guarantee clearly addressed a matter of public concern. *See* Ann Crittenden, *Treasury's Ousted Chrysler Critic*, The New York Times, March 6, 1981, at D1; Andy Pasztor, *Chrysler to Get Additional U.S. Support Though It Hasn't Fully Met Prior Terms*, The Wall Street Journal, February 26, 1981, at 2.

In the context of her firing, Ms. Mittleman was suspected of leaking to the press. A Treasury Inspector General ("I.G.") Report was prepared because Ms. Mittleman took her concerns about monitoring Chrysler to the I.G. Mr. Altman stated in the I.G. Report that there had been several leaks to the press of information regarding Chrysler's financial and operating problems and [based on information Altman received from a congressman], "it was logical to assume that it was she who had passed Chrysler information to the reporter." Altman further stated that he ordered

Ms. Mittleman to be terminated because she "lacked understanding of the real problems plus she presented a potential risk for damaging news leaks."

In December 1980, Chrysler Chairman Lee Iacocca came to the Treasury, seeking additional funds under the Loan Guarantee. On December 8, 1980, the date of the Loan Guarantee Board meeting with Iacocca, Altman ordered that Ms. Mittleman be fired. Shortly thereafter, Altman left the Treasury to return to investment banking in New York. Altman had been interviewing for investment banking positions while employed at the Treasury. As an investment banker, he had Chrysler as a client following his help to Chrysler in receiving government assistance in the Chrysler Loan Guarantee program. *See Altman v. Altman*, 542 N.Y.S.2d 7, 8 (A.D. 1 Dept. 1989)(Altman was negotiating with several investment banking firms when he was preparing to return to Wall Street); David S. Hilzenrath, *A Deputy Secretary's Complex Task*, The Washington Post, February 10, 1993, at C1 (noting Altman's long association with Chrysler, including his work on rescuing Chrysler while he was Assistant Treasury Secretary and then having Chrysler for a client when he returned to investment banking). Altman is now being described as a "legendary deal maker and former Clinton administration official" in line to receive part of the $200 million in fees for his work on "brokering the mega-deal between AT&T and Bell South Corp." *See* Zachery Kouwe, *$200M Phone Charge*, New York Post, March 8, 2006, at http://www.nypost.com/business/64757.htm.

Iacocca famously hated negative publicity and having to report to the government. *See* Lee Iacocca, *Iacocca: An Autobiography* (1984) at 255-57 (although

we fought so hard to keep Chrysler's bad news off the front pages, we soon had to go back to Washington to draw down another $400 million in guarantees; for each drawdown, we had to face up to the bad headlines; the Loan Guarantee Board burdened us with a ridiculous amount of paperwork). Ms. Mittleman believes that Altman gained favor with Iacocca by firing and discrediting her when she criticized Chrysler's financial reporting. Iacocca [who was a Ford executive before he moved to Chrysler] was aware of Ms. Mittleman and her experience at Ford Motor Company. When Ms. Mittleman insisted, in the course of her employment duties, that Chrysler submit the required reports, she was angrily told by a Chrysler executive that she would cause Chrysler to go bankrupt.

Ms. Mittleman sought the assistance of the Office of Special Counsel ("OSC") when she was fired. However, she was a member of the excepted service and was not an employee as defined by the Civil Service Reform Act. As a result, she did not receive any Civil Service protection from being fired. *See* Leslie Phillips, *Whistle-blower measure urges better protection*, USA TODAY, March 15, 1989, at 4A; David Hess, *Informers' bill clears Congress*, Philadelphia Inquirer, March 22, 1989 (in the last eight years, the special counsel has turned down more than 99 percent of whistleblowers' complaints without initiating any corrective action; new bill is too late for Mittleman, whose case is cited by the Government Accountability Project's Thomas Devine as a "classic example of the utter failure of the 1978 Whistleblower's Protection Act.")

One provision in the Whistleblower Protection Act of 1989 was based on Ms. Mittleman's unsuccessful experience with the Office of Special Counsel. *See* S.

Rep. No. 100-413, at 10-11 (1988)("Ms. Mittleman not only did not receive any assistance from OSC on her complaint of reprisal, she was actually hurt by her contacting the OSC because of the OSC investigator's negative comments to OPM").

Based on her experience, Ms. Mittleman is extremely concerned that federal workers who engage in speech on a matter of public concern continue to lack adequate protection. It is necessary that the caselaw be consistent and clearly reflect the fundamental premise of the First Amendment right to speech. The welfare of all is served if federal employees can speak on important matters about the conduct of the government without fearing or suffering retaliation and severe career retribution.

SUMMARY OF ARGUMENT

This case and the pending case of *Whitman v. Department of Transportation*, No. 04-1131, present complex and related questions concerning the constitutional claims of public employees. In addressing these questions, it is necessary to have a complete understanding of the existing statutes and caselaw for federal employees, which is significantly different than the jurisprudence for state, county and municipal employees. For example, the *Pickering/ Connick* balancing test is typically not used in addressing a claim by a federal employee that she suffered retaliation for speech on a matter of public concern.

Further, it is necessary to address the interaction between constitutional claims and statutory provisions, such as the Civil Service Reform Act and the

Whistleblower Protection Act. The United States Brief in this case fails to address these issues. In addition, the arguments presented by the United States in this case and in *Whitman* appear to be contradictory and rely upon different precedents.

It is necessary that the First Amendment rights of federal employees be protected. The statutory provisions of the Civil Service Reform Act and the Whistleblower Protection Act should not preclude a federal employee from obtaining judicial review of a constitutional claim that she suffered retaliation for her speech on a matter of public concern.

ARGUMENT

I. The arguments presented concerning existing First Amendment jurisprudence for public employees must distinguish between federal employees and state, county and municipal employees.

The arguments presented in this case refer to public employees, but fail to distinguish the existing First Amendment jurisprudence for federal employees, as compared with the jurisprudence for state, county and municipal employees (hereinafter, "municipal employees"). The well-known balancing test, as set out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 1983), is applied to municipal employees, such as respondent Ceballos, but not to individual federal employees in personnel matters (with perhaps some exceptions).

Moreover, the cause of action alleging a First Amendment claim is different for municipal employees

and federal employees. The respondent, although alleging a constitutional violation, has sued under a statute, 42 U.S.C. § 1983.

By contrast, a federal employee raising a constitutional claim against a superior in federal court does not have a statutory cause of action. Instead, the claim must be based on the judge-made cause of action based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). It is not clear when, if ever, the *Pickering/Connick* balancing test would be used in a *Bivens* action brought by a federal employee. Moreover, as will be discussed below, First Amendment claims by federal employees concerning protected speech have been precluded by the statutory framework of the Civil Service Reform Act and the Whistleblower Protection Act. These statutes have no provision that applies a *Pickering/Connick* balancing test.

If the *Pickering/Connick* balancing test is not used in a First Amendment claim brought by federal employees (but is used in a comparable claim by municipal employees), then the Question Presented in this case does not apply to federal employees. Further, the questions whether speech by a federal employee touches a matter of public concern and whether speech is expressed pursuant to the duties of employment would not be at issue, even though those questions are presented in the claims of respondent Ceballos.

Any ruling in this case, with its supporting rationale, which is construed as applying to "public employees" and which fails to distinguish between federal and municipal employees, will generate further confusion in First Amendment jurisprudence.

II. The Brief for the United States fails to address the interaction between the Civil Service Reform Act, the Whistleblower Protection Act and the First Amendment in claims that a federal employee has suffered retaliation because of her speech.

The confusion as to the applicability of the *Pickering/Connick* balancing test for federal employees has been greatly exacerbated by the glaring omissions in the Brief for the United States. Specifically, the U.S. Brief does not cite or discuss the Civil Service Reform Act ("CSRA") of 1978, Pub.L.No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*), and the Whistleblower Protection Act ("WPA") of 1989, Pub.L.No. 101-12, 103 Stat. 16 (codified in scattered sections of 5 U.S.C.). Similarly, the U.S. Brief does not cite the preeminent caselaw for federal employees, including *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and *Bush v. Lucas*, 462 U.S. 367 (1983).

The stark difference in the caselaw analysis and tone between claims under the First Amendment and claims under the Whistleblower Protection Act must be appreciated. Opinions issued about the WPA engage in a highly technical statutory analysis. *See, e.g., Carson v. Department of Energy*, 398 F.3d 1369 (Fed.Cir. 2005). The fundamental rights set out in the First Amendment and as applied in the *Pickering/Connick* test by evaluating whether speech is about a matter of public concern are wholly ignored in WPA caselaw.

Moreover, the obvious tension between the technical provisions of the WPA and the fundamental

speech rights of the First Amendment have continued to fester. In spite of years of effort, Congress has not enacted whistleblower legislation that adequately protects federal employees. *See* Stephen Barr, *Bills Would Expand Whistle-Blower Protections*, The Washington Post, March 17, 2006, at D4 (bills follow a bipartisan effort to clarify whistleblower protection; a key proposal would allow government workers to seek jury trials, one of the rights provided to corporate whistleblowers in the 2002 Sarbanes-Oxley law).

III. The Brief for the United States fails to present or reconcile the arguments presented in this case and in the pending case of *Whitman v. Department of Transportation*, No. 04-1131.

The case of *Whitman v. Department of Transportation*, No. 04-1131, is pending before this Court. That case concerns the interaction between the Civil Service Reform Act and a constitutional claim, although apparently not a claim based on constitutionally-protected speech. The United States, in its Brief for the Respondents in *Whitman*, addresses at length the CSRA and describes the confusing and uncertain interplay between claims brought pursuant to the CSRA and the Constitution.

In its *Whitman* Brief at 32, the United States argues that petitioner's constitutional claims must be raised through the procedures prescribed by the CSRA. There is no mention of any *Pickering/Connick* balancing test. By contrast, in its *Garcetti* Brief, the United States does not even mention the CSRA. Further, the United States does not argue in the *Garcetti* Brief that a federal employee's constitutional

speech claims must be raised through the procedures prescribed by the CSRA.

The arguments presented by the United States in the *Garcetti* and *Whitman* cases cannot be reconciled. This conflict may have been generated by the fact that the *Garcetti* case concerns an employee of Los Angeles County. However, the Question Presented utilized the broad term, "public employee." The United States may have tried to construct its argument to support the position of Los Angeles County, while ignoring the pertinent federal caselaw and statutes. It would have been far preferable for the United States, as *Amicus Curiae* in *Garcetti*, to set out fully the caselaw for federal employees and then compare it to caselaw for municipal employees. The intermingling of and substitution between caselaw for federal and municipal employees is significantly misleading.

IV. The argument by the United States based on *Huffman v. OPM* is misleading, because *Huffman* concerns the Whistleblower Protection Act and not the First Amendment.

The United States further confuses the jurisprudence by its reliance upon *Huffman v. OPM*, 263 F.3d 1341 (Fed.Cir. 2001), in its Brief at 27. The question in *Huffman* was whether an employee's complaints constituted "disclosures" under the Whistleblower Protection Act. Thus, the *Huffman* analysis was based on the legislative history of the WPA. The reasoning in *Huffman* is not applicable to the Question Presented in this case, which is whether speech that is part of the duties of employment is

protected under the First Amendment and the *Pickering/Connick* test.

The reliance of the United States on *Huffman* is misleading also because of the unique job responsibility (working in an Inspector General's office) at issue. It is incorrect to generalize from the limited factual situation presented in *Huffman*. A Texas state court refused to follow *Huffman*, noting that "*Huffman* is contrary to our own precedent and other Texas cases, which hold that a public employee who reports a violation of law in the course of his employment is protected by the Act." *See Rogers v. City of Fort Worth*, 89 S.W.3d 265, 276 (Tex.App.-Fort Worth 2002).

The United States, in its Brief at 27, makes the exceedingly vague representation that Congress and state legislatures have enacted whistleblower laws and some of them do provide protection, at least in certain circumstances, for employees whose job duties obligate them to report official wrongdoing. As discussed above, the United States wholly failed to describe pertinent caselaw or even cite the Whistleblower Protection Act. Thus, this statement filled with qualifiers is meaningless. The reliance upon *Huffman* in this context simply confuses yet again.

V. In the *Whitman* case, the United States has now acknowledged that the CSRA and WPA cannot preclude judicial review of First Amendment claims of federal employees.

The United States has made a very significant admission in the *Whitman* case. In the U.S. Brief at 47 in *Whitman*, the United States has acknowledged that

the structure of the CSRA is not a sufficient basis to overcome the presumption in favor of judicial review of constitutional claims.

The courts had previously held that the CSRA precludes constitutional claims, but, in so holding, the courts often failed to apply the technical statutory analysis required. The U.S. Brief in *Whitman* makes clear that the CSRA requires evaluation of personnel actions, prohibited personnel practices, and major as compared to minor adverse actions. In addition, persons, such as Ms. Mittleman, who were in the excepted service [as a Schedule A employee] and not the competitive service, were not provided with complete statutory protection under the CSRA.

The courts were fully aware that persons, such as Ms. Mittleman, did not receive protection under the CSRA and yet those persons were precluded from seeking judicial review of a First Amendment claim. *See Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988); *Hall v. Clinton*, 235 F.3d 202, 205 (4th Cir. 2000); *Hall v. Clinton*, 285 F.3d 74, 81 (D.C.Cir. 2002)(CSRA is the exclusive remedy for federal employees with individualized job grievances, even it if affords incomplete relief).

Ms. Mittleman pursued lengthy and extremely burdensome litigation to seek a remedy from her experience at the Treasury. The many issues presented in that litigation will not be discussed here, but it is important (at least to Ms. Mittleman) to note that she did not receive proper judicial review or any remedy whatever for her First Amendment claim that she was fired because she criticized Chrysler and was suspected of leaking to the press. *See Mittleman v. United States*

Treasury, 773 F.Supp. 442, 449, 453 (D.D.C. 1991) (CSRA is the exclusive remedy; the fact that Congress explicitly denied a remedy to Schedule A employees shows an intention to deny them a statutory or constitutional remedy for damages).

Ms. Mittleman submits that those holdings [that the CSRA precluded constitutional claims] were premised upon an extremely broad and incorrect interpretation of congressional intent. Without engaging in a detailed analysis here, Ms. Mittleman submits that Congress did not [and could not constitutionally] explicitly deny a remedy to Schedule A employees, such as Ms. Mittleman. Rather, Ms. Mittleman was simply outside the coverage of [and essentially ignored] by the CSRA. The United States has now conceded that this broad interpretation of congressional intent was not correct. In its *Whitman* Brief at 48, the United States acknowledges that the CSRA does not contain the requisite clarity to foreclose judicial review of the limited class of constitutional claims that are not resolved through the administrative process.

Ms. Mittleman respectfully submits that cases, such as hers, present significant First Amendment claims that were plainly not resolved through the administrative process. Federal employees, such as Ms. Mittleman, should be able to obtain judicial review of their constitutional claims. There are important issues concerning government accountability at stake which clearly merit judicial review.

Moreover, if federal employees can now bring constitutional claims to court (after availing themselves of any administrative process), then the well-known

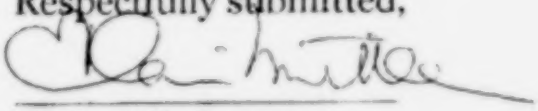
Pickering/Connick balancing test presumably should apply. In other words, the First Amendment jurisprudence (including the balancing test) should be applicable to all employees. There should not be (as there is now) a distinction in status under the First Amendment for federal employees as compared to municipal employees.

It is necessary that the Court address the availability of constitutional claims by federal employees in light of existing jurisprudence and hold that federal employees do, in fact, have a right to judicial review of their constitutional claims under the First Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,



Elaine Mittleman
2040 Arch Drive
Falls Church, VA 22043
(703) 734-0482

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GARCETTI ET AL. *v.* CEBALLOS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–473. Argued October 12, 2005—Reargued March 21, 2006—Decided May 30, 2006

Respondent Ceballos, a supervising deputy district attorney, was asked by defense counsel to review a case in which, counsel claimed, the affidavit police used to obtain a critical search warrant was inaccurate. Concluding after the review that the affidavit made serious misrepresentations, Ceballos relayed his findings to his supervisors, petitioners here, and followed up with a disposition memorandum recommending dismissal. Petitioners nevertheless proceeded with the prosecution. At a hearing on a defense motion to challenge the warrant, Ceballos recounted his observations about the affidavit, but the trial court rejected the challenge. Claiming that petitioners then retaliated against him for his memo in violation of the First and Fourteenth Amendments, Ceballos filed a 42 U. S. C. §1983 suit. The District Court granted petitioners summary judgment, ruling, *inter alia*, that the memo was not protected speech because Ceballos wrote it pursuant to his employment duties. Reversing, the Ninth Circuit held that the memo's allegations were protected under the First Amendment analysis in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, and *Connick* v. *Myers*, 461 U. S. 138.

Held: When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. Pp. 5–14.

(a) Two inquiries guide interpretation of the constitutional protections accorded public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *Pickering*, *supra*, at 568. If the answer is no, the em-

ployee has no First Amendment cause of action based on the employer's reaction to the speech. See *Connick*, *supra*, at 147. If the answer is yes, the possibility of a First Amendment claim arises. The question becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering*, *supra*, at 568. This consideration reflects the importance of the relationship between the speaker's expressions and employment. Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently. Cf. *Connick*, *supra*, at 143. Thus, a government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect its operations. On the other hand, a citizen who works for the government is nonetheless still a citizen. The First Amendment limits a public employer's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry* v. *Sindermann*, 408 U. S. 593, 597. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e.g.*, *Connick*, *supra*, at 147. Pp. 5–8.

(b) Proper application of the Court's precedents leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail. The dispositive factor here is not that Ceballos expressed his views inside his office, rather than publicly, see, *e.g.*, *Givhan* v. *Western Line Consol. School Dist.*, 439 U. S. 410, 414, nor that the memo concerned the subject matter of his employment, see, *e.g.*, *Pickering*, 391 U. S. at 573. Rather, the controlling factor is that Ceballos' expressions were made pursuant to his official duties. That consideration distinguishes this case from those in which the First Amendment provides protection against discipline. Ceballos wrote his disposition memo because that is part of what he was employed to do. He did not act as a citizen by writing it. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger* v. *Rector and Visitors*

Syllabus

of Univ. of Va., 515 U. S. 819, 833. This result is consistent with the Court's prior emphasis on the potential societal value of employee speech and on affording government employers sufficient discretion to manage their operations. Ceballos' proposed contrary rule, adopted by the Ninth Circuit, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in the Court's precedents. The doctrinal anomaly the Court of Appeals perceived in compelling public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties misconceives the theoretical underpinnings of this Court's decisions and is unfounded as a practical matter. Pp. 8–13.

(c) Exposing governmental inefficiency and misconduct is a matter of considerable significance, and various measures have been adopted to protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions. These include federal and state whistle-blower protection laws and labor codes and, for government attorneys, rules of conduct and constitutional obligations apart from the First Amendment. However, the Court's precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job. Pp. 13–14.

361 F. 3d 1168, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined. BREYER, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–473

GIL GARCETTI, ET AL., PETITIONERS *v.* RICHARD CEBALLOS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 30, 2006]

JUSTICE KENNEDY delivered the opinion of the Court.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick* v. *Myers*, 461 U. S. 138, 142 (1983). The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

I

Respondent Richard Ceballos has been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. During the period relevant to this case, Ceballos was a calendar deputy in the office's Pomona branch, and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant. The attorney informed Ceballos that he had filed a motion to traverse, or chal-

lenge, the warrant, but he also wanted Ceballos to review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks.

Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not receive a satisfactory explanation for the perceived inaccuracies. He relayed his findings to his supervisors, petitioners Carol Najera and Frank Sundstedt, and followed up by preparing a disposition memorandum. The memo explained Ceballos' concerns and recommended dismissal of the case. On March 2, 2000, Ceballos submitted the memo to Sundstedt for his review. A few days later, Ceballos presented Sundstedt with another memo, this one describing a second telephone conversation between Ceballos and the warrant affiant.

Based on Ceballos' statements, a meeting was held to discuss the affidavit. Attendees included Ceballos, Sundstedt, and Najera, as well as the warrant affiant and other employees from the sheriff's department. The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.

Despite Ceballos' concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion to traverse. The trial court held a hearing on the motion. Ceballos was called by the defense and

recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued in the United States District Court for the Central District of California, asserting, as relevant here, a claim under Rev. Stat. §1979, 42 U. S. C. §1983. He alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2.

Petitioners responded that no retaliatory actions were taken against Ceballos and that all the actions of which he complained were explained by legitimate reasons such as staffing needs. They further contended that, in any event, Ceballos' memo was not protected speech under the First Amendment. Petitioners moved for summary judgment, and the District Court granted their motion. Noting that Ceballos wrote his memo pursuant to his employment duties, the court concluded he was not entitled to First Amendment protection for the memo's contents. It held in the alternative that even if Ceballos' speech was constitutionally protected, petitioners had qualified immunity because the rights Ceballos asserted were not clearly established.

The Court of Appeals for the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment." 361 F. 3d 1168, 1173 (2004). In reaching its conclusion the court looked to the First Amendment analysis set forth in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968), and

Connick, 461 U. S. 138. *Connick* instructs courts to begin by considering whether the expressions in question were made by the speaker "as a citizen upon matters of public concern." See *id.*, at 146–147. The Court of Appeals determined that Ceballos' memo, which recited what he thought to be governmental misconduct, was "inherently a matter of public concern." 361 F. 3d, at 1174. The court did not, however, consider whether the speech was made in Ceballos' capacity as a citizen. Rather, it relied on Circuit precedent rejecting the idea that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility." *Id.*, at 1174–1175 (citing cases including *Roth* v. *Veteran's Admin. of Govt. of United States*, 856 F. 2d 1401 (CA9 1988)).

Having concluded that Ceballos' memo satisfied the public-concern requirement, the Court of Appeals proceeded to balance Ceballos' interest in his speech against his supervisors' interest in responding to it. See *Pickering*, *supra*, at 568. The court struck the balance in Ceballos' favor, noting that petitioners "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" as a result of the memo. See 361 F. 3d, at 1180. The court further concluded that Ceballos' First Amendment rights were clearly established and that petitioners' actions were not objectively reasonable. See *id.*, at 1181–1182.

Judge O'Scannlain specially concurred. Agreeing that the panel's decision was compelled by Circuit precedent, he nevertheless concluded Circuit law should be revisited and overruled. See *id.*, at 1185. Judge O'Scannlain emphasized the distinction "between speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import." *Id.*, at 1187. In his

view, "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right." *Id.*, at 1189.

We granted certiorari, 543 U. S. 1186 (2005), and we now reverse.

II

As the Court's decisions have noted, for many years "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick*, 461 U. S., at 143. That dogma has been qualified in important respects. See *id.*, at 144–145. The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. See, *e.g.*, *Pickering*, *supra*, at 568; *Connick*, *supra*, at 147; *Rankin* v. *McPherson*, 483 U. S. 378, 384 (1987); *United States* v. *Treasury Employees*, 513 U. S. 454, 466 (1995).

Pickering provides a useful starting point in explaining the Court's doctrine. There the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. 391 U. S., at 566. "The problem in any case," the Court stated, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*, at 568. The Court found the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or

to have interfered with the regular operation of the schools generally." *Id.*, at 572–573 (footnote omitted). Thus, the Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.*, at 573.

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *id.*, at 568. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See *Connick*, *supra*, at 147. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering*, 391 U. S., at 568. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal." *Id.*, at 569. The Court's overarching objectives, though, are evident.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, *e.g.*, *Waters* v. *Churchill*, 511 U. S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer

indeed has far broader powers than does the government as sovereign"). Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Cf. *Connick*, *supra*, at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter"). Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972). So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e.g.*, *Connick*, *supra*, at 147 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its holding as rejecting the attempt of school administrators to "limi[t] teachers' opportunities to contribute to public debate." 391 U. S., at 573. It also noted that teachers are "the members of a community most likely to have informed and

definite opinions" about school expenditures. *Id.*, at 572. The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. See, *e.g.*, *San Diego* v. *Roe*, 543 U. S. 77, 82 (2004) *(per curiam)* ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted)); cf. *Treasury Employees*, 513 U. S., at 470 ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said").

The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. See, *e.g.*, *Rankin*, 483 U. S., at 384 (recognizing "the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment"). Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance." *Connick*, 461 U. S., at 154.

III

With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his

views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. See, *e.g.*, *Givhan* v. *Western Line Consol. School Dist.*, 439 U. S. 410, 414 (1979). Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like "any member of the general public," *Pickering*, 391 U. S., at 573, to hold that all speech within the office is automatically exposed to restriction.

The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job. See, *e.g.*, *ibid.*; *Givhan*, *supra*, at 414. As the Court noted in *Pickering*: "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U. S., at 572. The same is true of many other categories of public employees.

The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. See Brief for Respondent 4 ("Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor'"). That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Ceballos wrote his disposition memo because that is

part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 833 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"). Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

This result is consistent with our precedents' attention to the potential societal value of employee speech. See *supra*, at 7–8. Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect

of protection, however, does not invest them with a right to perform their jobs however they see fit.

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.

Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents. When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.

The Court of Appeals based its holding in part on what it perceived as a doctrinal anomaly. The court suggested it would be inconsistent to compel public employers to

tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties. See 361 F. 3d, at 1176. This objection misconceives the theoretical underpinnings of our decisions. Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, see *Pickering*, 391 U. S. 563, or discussing politics with a co-worker, see *Rankin*, 483 U. S. 378. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

The Court of Appeals' concern also is unfounded as a practical matter. The perceived anomaly, it should be noted, is limited in scope: It relates only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints (such as those at issue in cases like *Pickering* and *Connick*) that are made outside the duties of employment. If, moreover, a government employer is troubled by the perceived anomaly, it has the means at hand to avoid it. A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.

Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail.

Two final points warrant mentioning. First, as indi-

cated above, the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. See *post*, at 4, n. 2 (SOUTER, J., dissenting). The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Second, JUSTICE SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. See *post*, at 12–13. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

IV

Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick*, public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." 461 U. S., at 149. The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to

expose wrongdoing. See, *e.g.*, 5 U. S. C. §2302(b)(8); Cal. Govt. Code Ann. §8547.8 (West 2005); Cal. Lab. Code Ann. §1102.5 (West Supp. 2006). Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the First Amendment. See, *e.g.*, Cal. Rule Prof. Conduct 5–110 (2005) ("A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause"); *Brady* v. *Maryland*, 373 U. S. 83 (1963). These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.

We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 04–473

GIL GARCETTI, ET AL., PETITIONERS *v.* RICHARD CEBALLOS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 30, 2006]

JUSTICE STEVENS, dissenting.

The proper answer to the question "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties," *ante,* at 1, is "Sometimes," not "Never." Of course a supervisor may take corrective action when such speech is "inflammatory or misguided," *ante,* at 11. But what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover?*

*See, *e.g.*, *Branton* v. *Dallas*, 272 F. 3d 730 (CA5 2001) (police internal investigator demoted by police chief after bringing the false testimony of a fellow officer to the attention of a city official); *Miller* v. *Jones*, 444 F. 3d 929, 936 (CA7 2006) (police officer demoted after opposing the police chief's attempt to "us[e] his official position to coerce a financially independent organization into a potentially ruinous merger"); *Delgado* v. *Jones*, 282 F. 3d 511 (CA7 2002) (police officer sanctioned for reporting criminal activity that implicated a local political figure who was a good friend of the police chief); *Herts* v. *Smith*, 345 F. 3d 581 (CA8 2003) (school district official's contract was not renewed after she gave frank testimony about the district's desegregation efforts); *Kincade* v. *Blue Springs*, 64 F. 3d 389 (CA8 1995) (engineer fired after reporting to his supervisors that contractors were failing to

As JUSTICE SOUTER explains, public employees are still citizens while they are in the office. The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong. Over a quarter of a century has passed since then-Justice Rehnquist, writing for a unanimous Court, rejected "the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." *Givhan* v. *Western Line Consol. School Dist.*, 439 U. S. 410, 414 (1979). We had no difficulty recognizing that the First Amendment applied when Bessie Givhan, an English teacher, raised concerns about the school's racist employment practices to the principal. See *id.*, at 413–416. Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial. That is equally true today, for it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description. Moreover, it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.

While today's novel conclusion to the contrary may not be "inflammatory," for the reasons stated in JUSTICE SOUTER's dissenting opinion it is surely "misguided."

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complete dam-related projects and that the resulting dam might be structurally unstable); *Fox* v. *District of Columbia*, 83 F. 3d 1491, 1494 (CADC 1996) (D. C. Lottery Board security officer fired after informing the police about a theft made possible by "rather drastic managerial ineptitude").

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[May 30, 2006]

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

The Court holds that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Ante*, at 9. I respectfully dissent. I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work. But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

I

Open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment. See, *e.g.*, *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377 (1997). At the other extreme, a statement by a government em-

ployee complaining about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee. See *Connick* v. *Myers*, 461 U. S. 138, 147 (1983). In between these points lies a public employee's speech unwelcome to the government but on a significant public issue. Such an employee speaking as a citizen, that is with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit thought to flow from the statements. *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968). Entitlement to protection is thus not absolute.

This significant, albeit qualified, protection of public employees who irritate the government is understood to flow from the First Amendment, in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him. Still, the First Amendment safeguard rests on something more, being the value to the public of receiving the opinions and information that a public employee may disclose. "Government employees are often in the best position to know what ails the agencies for which they work." *Waters* v. *Churchill*, 511 U. S. 661, 674 (1994).

The reason that protection of employee speech is qualified is that it can distract co-workers and supervisors from their tasks at hand and thwart the implementation of legitimate policy, the risks of which grow greater the closer the employee's speech gets to commenting on his own workplace and responsibilities. It is one thing for an office clerk to say there is waste in government and quite another to charge that his own department pays full-time

salaries to part-time workers. Even so, we have regarded eligibility for protection by *Pickering* balancing as the proper approach when an employee speaks critically about the administration of his own government employer. In *Givhan* v. *Western Line Consol. School Dist.*, 439 U. S. 410 (1979), we followed *Pickering* when a teacher was fired for complaining to a superior about the racial composition of the school's administrative, cafeteria, and library staffs, 439 U. S., at 413–414, and the same point was clear in *Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167 (1976). That case was decided, in part, with reference to the *Pickering* framework, and the Court there held that a schoolteacher speaking out on behalf of himself and others at a public school board meeting could not be penalized for criticizing pending collective-bargaining negotiations affecting professional employment. *Madison* noted that the teacher "addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government." 429 U. S., at 174–175. In each case, the Court realized that a public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job, and *Givhan* stands for the same conclusion even when the speech is not addressed to the public at large. Cf. *Pegram* v. *Herdrich*, 530 U. S. 211, 225 (2000) (recognizing that, factually, a trustee under the Employee Retirement Income Security Act of 1974 can both act as ERISA fiduciary and act on behalf of the employer).

The difference between a case like *Givhan* and this one is that the subject of Ceballos's speech fell within the scope of his job responsibilities, whereas choosing personnel was not what the teacher was hired to do. The effect of the majority's constitutional line between these two cases, then, is that a *Givhan* schoolteacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that

the principal disapproved of hiring minority job applicants. This is an odd place to draw a distinction,[1] and while necessary judicial line-drawing sometimes looks arbitrary, any distinction obliges a court to justify its choice. Here, there is no adequate justification for the majority's line categorically denying *Pickering* protection to any speech uttered "pursuant to . . . official duties," *ante*, at 9.

As all agree, the qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees. The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties.[2]

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[1] It seems stranger still in light of the majority's concession of some First Amendment protection when a public employee repeats statements made pursuant to his duties but in a separate, public forum or in a letter to a newspaper. *Ante*, at 12.

[2] I do not say the value of speech "pursuant to . . . duties" will always be greater, because I am pessimistic enough to expect that one response to the Court's holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview. Now that the government can freely penalize the school personnel officer for criticizing the principal because speech on the subject falls within the personnel officer's job responsibilities, the government may well try to limit the English teacher's options by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school. Hence today's rule presents the regrettable prospect that protection under *Pickering* v. *Board of Ed. of Township High School*

As for the importance of such speech to the individual, it stands to reason that a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his work day after day. Would anyone doubt that a school principal evaluating the performance of teachers for promotion or pay adjustment retains a citizen's interest in addressing the quality of teaching in the schools? (Still, the majority indicates he could be fired without First Amendment recourse for fair but unfavorable comment when the teacher under review is the superintendent's daughter.) Would anyone deny that a prosecutor like Richard Ceballos may claim the interest of any citizen in speaking out against a rogue law enforcement officer, simply because his job requires him to express a judgment about the officer's performance? (But the majority says the First Amendment gives Ceballos no protection, even if his judgment in this case was sound and appropriately expressed.)

Indeed, the very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's "object . . . to unite [m]y avocation and my vocation;"[3] these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.[4] There is no question that

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Dist. 205, Will Cty., 391 U. S. 563 (1968), may be diminished by expansive statements of employment duties.

The majority's response, that the enquiry to determine duties is a "practical one," *ante*, at 13, does not alleviate this concern. It sets out a standard that will not discourage government employers from setting duties expansively, but will engender litigation to decide which stated duties were actual and which were merely formal.

[3]R. Frost, Two Tramps in Mud Time, Collected Poems, Prose, & Plays 251, 252 (R. Poirier & M. Richardson eds. 1995).

[4]Not to put too fine a point on it, the Human Resources Division of the Los Angeles County District Attorney's Office, Ceballos's employer.

public employees speaking on matters they are obliged to address would generally place a high value on a right to speak, as any responsible citizen would.

Nor is there any reason to raise the counterintuitive question whether the public interest in hearing informed employees evaporates when they speak as required on some subject at the core of their jobs. Two Terms ago, we recalled the public value that the *Pickering* Court perceived in the speech of public employees as a class: "Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of

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is telling anyone who will listen that its work "provides the personal satisfaction and fulfillment that comes with knowing you are contributing essential services to the citizens of Los Angeles County." Career Opportunities, http://da.co.la.ca.us/hr/default.htm (all Internet materials as visited May 25, 2006, and available in Clerk of Court's case file).

The United States expresses the same interest in identifying the individual ideals of a citizen with its employees' obligations to the Government. See Brief as *Amicus Curiae* 25 (stating that public employees are motivated to perform their duties "to serve the public"). Right now, for example, the U. S. Food and Drug Administration is appealing to physicians, scientists, and statisticians to work in the Center for Drug Evaluation and Research, with the message that they "can give back to [their] community, state, and country by making a difference in the lives of Americans everywhere." Career Opportunities at CDER: You Can Make a Difference, http://www.fda.gov/cder/career/default.htm. Indeed, the Congress of the United States, by concurrent resolution, has previously expressly endorsed respect for a citizen's obligations as the prime responsibility of Government employees: "Any person in Government Service should: . . . [p]ut loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department," and shall "[e]xpose corruption wherever discovered." Code of Ethics for Government Service, H. Con. Res. 175, 85th Cong., 2d Sess., 72 Stat. B12. Display of this Code in Government buildings was once required by law, 94 Stat. 855; this obligation has been repealed, Office of Government Ethics Authorization Act of 1996, Pub. L. 104–179, §4, 110 Stat. 1566.

substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *San Diego* v. *Roe*, 543 U. S. 77, 82 (2004) *(per curiam)* (citation omitted). This is not a whit less true when an employee's job duties require him to speak about such things: when, for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior's order to violate constitutional rights he is sworn to protect. (The majority, however, places all these speakers beyond the reach of First Amendment protection against retaliation.)

Nothing, then, accountable on the individual and public side of the *Pickering* balance changes when an employee speaks "pursuant" to public duties. On the side of the government employer, however, something is different, and to this extent, I agree with the majority of the Court. The majority is rightly concerned that the employee who speaks out on matters subject to comment in doing his own work has the greater leverage to create office uproars and fracture the government's authority to set policy to be carried out coherently through the ranks. "Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission," *ante*, at 11. Up to a point, then, the majority makes good points: government needs civility in the workplace, consistency in policy, and honesty and competence in public service.

But why do the majority's concerns, which we all share, require categorical exclusion of First Amendment protec-

tion against any official retaliation for things said on the job? Is it not possible to respect the unchallenged individual and public interests in the speech through a *Pickering* balance without drawing the strange line I mentioned before, *supra*, at 3–4? This is, to be sure, a matter of judgment, but the judgment has to account for the undoubted value of speech to those, and by those, whose specific public job responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths. And it has to account for the need actually to disrupt government if its officials are corrupt or dangerously incompetent. See n. 4, *supra*. It is thus no adequate justification for the suppression of potentially valuable information simply to recognize that the government has a huge interest in managing its employees and preventing the occasionally irresponsible one from turning his job into a bully pulpit. Even there, the lesson of *Pickering* (and the object of most constitutional adjudication) is still to the point: when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.

Two reasons in particular make me think an adjustment using the basic *Pickering* balancing scheme is perfectly feasible here. First, the extent of the government's legitimate authority over subjects of speech required by a public job can be recognized in advance by setting in effect a minimum heft for comments with any claim to outweigh it. Thus, the risks to the government are great enough for us to hold from the outset that an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it. The examples I have already given indicate the eligible subject matter, and it is fair to say that only comment on official dishonesty, deliberately unconsti-

tutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor. If promulgation of this standard should fail to discourage meritless actions premised on 42 U. S. C. §1983 (or *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)) before they get filed, the standard itself would sift them out at the summary-judgment stage.[5]

My second reason for adapting *Pickering* to the circumstances at hand is the experience in Circuits that have recognized claims like Ceballos's here. First Amendment protection less circumscribed than what I would recognize has been available in the Ninth Circuit for over 17 years, and neither there nor in other Circuits that accept claims like this one has there been a debilitating flood of litigation. There has indeed been some: as represented by Ceballos's lawyer at oral argument, each year over the last five years, approximately 70 cases in the different Courts of Appeals and approximately 100 in the various District Courts. Tr. of Oral Arg. 58–59. But even these figures reflect a readiness to litigate that might well have been cooled by my view about the importance required before *Pickering* treatment is in order.

For that matter, the majority's position comes with no guarantee against factbound litigation over whether a public employee's statements were made "pursuant to . . . official duties," *ante*, at 9. In fact, the majority invites such litigation by describing the enquiry as a "practical one," *ante*, at 13, apparently based on the totality of employment circumstances.[6] See n. 2, *supra*. Are prosecu-

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[5]As I also said, a public employer is entitled (and obliged) to impose high standards of honesty, accuracy, and judgment on employees who speak in doing their work. These criteria are not, however, likely to discourage meritless litigation or provide a handle for summary judgment. The employee who has spoken out, for example, is unlikely to blame himself for prior bad judgment before he sues for retaliation.

[6]According to the majority's logic, the litigation it encourages would

tors' discretionary statements about cases addressed to the press on the courthouse steps made "pursuant to their official duties"? Are government nuclear scientists' complaints to their supervisors about a colleague's improper handling of radioactive materials made "pursuant" to duties?

II

The majority seeks support in two lines of argument extraneous to *Pickering* doctrine. The one turns on a fallacious reading of cases on government speech, the other on a mistaken assessment of protection available under whistle-blower statutes.

A

The majority accepts the fallacy propounded by the county petitioners and the Federal Government as *amicus* that any statement made within the scope of public employment is (or should be treated as) the government's own speech, see *ante*, at 10, and should thus be differentiated as a matter of law from the personal statements the First Amendment protects, see *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610 (1973). The majority invokes the interpretation set out in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), of *Rust* v. *Sullivan*, 500 U. S. 173 (1991), which held there was no infringement of the speech rights of Title X funds recipients and their staffs when the Government forbade any on-the-job counseling in favor of abortion as a method of family planning, *id.*, at 192–200. We have read *Rust* to mean that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, *supra*, at 833.

The key to understanding the difference between this

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have the unfortunate result of "demand[ing] permanent judicial intervention in the conduct of governmental operations." *ante*, at 11.

case and *Rust* lies in the terms of the respective employees' jobs and, in particular, the extent to which those terms require espousal of a substantive position prescribed by the government in advance. Some public employees are hired to "promote a particular policy" by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto. See *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 542 (2001). There is no claim or indication that Ceballos was hired to perform such a speaking assignment. He was paid to enforce the law by constitutional action: to exercise the county government's prosecutorial power by acting honestly, competently, and constitutionally. The only sense in which his position apparently required him to hew to a substantive message was at the relatively abstract point of favoring respect for law and its evenhanded enforcement, subjects that are not at the level of controversy in this case and were not in *Rust*. Unlike the doctors in *Rust*, Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden. The county government's interest in his speech cannot therefore be equated with the terms of a specific, prescribed, or forbidden substantive position comparable to the Federal Government's interest in *Rust*, and *Rust* is no authority for the notion that government may exercise plenary control over every comment made by a public employee in doing his job.

It is not, of course, that the district attorney lacked interest of a high order in what Ceballos might say. If his speech undercut effective, lawful prosecution, there would have been every reason to rein him in or fire him; a statement that created needless tension among law enforcement agencies would be a fair subject of concern, and the same would be true of inaccurate statements or false ones

made in the course of doing his work. But these interests on the government's part are entirely distinct from any claim that Ceballos's speech was government speech with a preset or proscribed content as exemplified in *Rust*. Nor did the county petitioners here even make such a claim in their answer to Ceballos's complaint, see n. 13, *infra*.

The fallacy of the majority's reliance on *Rosenberger*'s understanding of *Rust* doctrine, moreover, portends a bloated notion of controllable government speech going well beyond the circumstances of this case. Consider the breadth of the new formulation:

> "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Ante*, at 10.

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to official duties." See *Grutter* v. *Bollinger*, 539 U. S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"); *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy

over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'" (quoting *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960))); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957) (a governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread").

B

The majority's second argument for its disputed limitation of *Pickering* doctrine is that the First Amendment has little or no work to do here owing to an assertedly comprehensive complement of state and national statutes protecting government whistle-blowers from vindictive bosses. See *ante*, at 13–14. But even if I close my eyes to the tenet that "'[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law,'" *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 680 (1996), the majority's counsel to rest easy fails on its own terms.[7]

To begin with, speech addressing official wrongdoing may well fall outside protected whistle-blowing, defined in the classic sense of exposing an official's fault to a third party or to the public; the teacher in *Givhan*, for example, who raised the issue of unconstitutional hiring bias, would not have qualified as that sort of whistle-blower, for she

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[7] Even though this Court has recognized that 42 U. S. C. §1983 "does not authorize a suit for every alleged violation of federal law," *Livadas* v. *Bradshaw*, 512 U. S. 107, 132 (1994), the rule is that "§1983 remains a generally and presumptively available remedy for claimed violations of federal law," *id.*, at 133. Individual enforcement under §1983 is rendered unavailable for alleged violations of federal law when the underlying statutory provision is part of a federal statutory scheme clearly incompatible with individual enforcement under §1983. See *Rancho Palos Verdes* v. *Abrams*, 544 U. S. 113, 119–120 (2005).

was fired after a private conversation with the school principal. In any event, the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief. See D. Westman & N. Modesitt, Whistleblowing: Law of Retaliatory Discharge 67–75, 281–307 (2d ed. 2004). Some state statutes protect all government workers, including the employees of municipalities and other subdivisions;[8] others stop at state employees.[9] Some limit protection to employees who tell their bosses before they speak out;[10] others forbid bosses from imposing any requirement to warn.[11] As for the federal Whistleblower Protection Act of 1989, 5 U. S. C. §1213 *et seq.*, current case law requires an employee complaining of retaliation to show "'irrefragable proof'" that the person criticized was not acting in good faith and in compliance with the law, see *Lachance* v. *White*, 174 F. 3d 1378, 1381 (CA Fed. 1999), cert. denied, 528 U. S. 1153 (2000). And

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[8]Del. Code Ann., Tit. 29, §5115 (2003); Fla. Stat. §112.3187 (2003); Haw. Rev. Stat. §378–61 (1993); Ky. Rev. Stat. Ann. §61.101 (West 2005); Mass. Gen. Laws Ann., ch. 149, §185 (West 2004); Nev. Rev. Stat. §281.611 (2003); N. H. Rev. Stat. Ann. §275–E:1 (Supp. 2005); Ohio Rev. Code Ann. §4113.51 (Lexis 2001); Tenn. Code Ann. §50–1–304 (2006 Cum. Supp.).

[9]Ala. Code §36–26A–1 *et seq.* (2001); Colo. Rev. Stat. §24–50.5–101 *et seq.* (2004); Iowa Code Ann. §70A.28 *et seq.* (1999); Kan. Stat. Ann. §75–2973 (2003 Cum. Supp.); Mo. Rev. Stat. §105.055 (2004 Cum. Supp.); N. C. Gen. Stat. Ann. §126–84 (Lexis 2003); 2 Okla. Stat., Tit. 74, §840–2.5 *et seq.* (West 2005 Supp.); Wash. Rev. Code §42.40.010 (2000); Wyo. Stat. Ann. §9–11–102 (2003).

[10]Idaho Code §6–2104(1)(a) (Lexis 2004); Me. Rev. Stat. Ann., Tit. 26, §833(2) (1988); Mass. Gen. Laws Ann., ch. 149, §185(c)(1) (West 2004); N. H. Rev. Stat. Ann. §275–E:2(II) (1999); N. J. Stat. Ann. §34:19–4 (West 2000); N. Y. Civ. Serv. Law Ann. §75–b(2)(b) (West 1999); Wyo. Stat. Ann. §9–11–103(b) (2003).

[11]Kan. Stat. Ann. §75–2973(d)(2) (Cum. Supp. 2003); Ky. Rev. Stat. Ann. §61.102(1) (West 2005); Mo. Rev. Stat. §105.055(2) (2004 Cum. Supp.); 2 Okla. Stat., Tit. 74, §840–2.5(B)(4) (West 2005 Supp.); Ore. Rev. Stat. §659A.203(1)(c) (2003).

federal employees have been held to have no protection for disclosures made to immediate supervisors, see *Willis* v. *Department of Agriculture*, 141 F. 3d 1139, 1143 (CA Fed. 1998); *Horton* v. *Department of Navy*, 66 F. 3d 279, 282 (CA Fed. 1995), cert. denied, 516 U. S. 1176 (1996), or for statements of facts publicly known already, see *Francisco* v. *Office of Personnel Management*, 295 F. 3d 1310, 1314 (CA Fed. 2002). Most significantly, federal employees have been held to be unprotected for statements made in connection with normal employment duties, *Huffman* v. *Office of Personnel Management*, 263 F. 3d 1341, 1352 (CA Fed. 2001), the very speech that the majority says will be covered by "the powerful network of legislative enactments . . . available to those who seek to expose wrongdoing," *ante*, at 13–14.[12] My point is not to disparage particular statutes or speak here to the merits of interpretations by other federal courts, but merely to show the current understanding of statutory protection: individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.

III

The Court remands because the Court of Appeals considered only the disposition memorandum and because Ceballos charges retaliation for some speech apparently outside the ambit of utterances "pursuant to official duties." When the Court of Appeals takes up this case once again, it should consider some of the following facts that escape emphasis in the majority opinion owing to its focus.[13] Ceballos says he sought his position out of a per-

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[12] See n. 4, *supra*.

[13] This case comes to the Court on the motions of petitioners for summary judgment, and as such, "[t]he evidence of [Ceballos] is to be believed, and all justifiable inferences are to be drawn in his favor."

sonal commitment to perform civic work. After showing his superior, petitioner Frank Sunstedt, the disposition memorandum at issue in this case, Ceballos complied with Sunstedt's direction to tone down some accusatory rhetoric out of concern that the memorandum would be unnecessarily incendiary when shown to the Sheriff's Department. After meeting with members of that department, Ceballos told his immediate supervisor, petitioner Carol Najera, that he thought *Brady* v. *Maryland*, 373 U. S. 82 (1963), obliged him to give the defense his internal memorandum as exculpatory evidence. He says that Najera responded by ordering him to write a new memorandum containing nothing but the deputy sheriff's statements, but that he balked at that. Instead, he proposed to turn over the existing memorandum with his own conclusions redacted as work product, and this is what he did. The issue over revealing his conclusions arose again in preparing for the suppression hearing. Ceballos maintains that Sunstedt ordered Najera, representing the prosecution, to give the trial judge a full picture of the circumstances, but that Najera told Ceballos he would suffer retaliation if he testified that the affidavit contained intentional fabrications. In any event, Ceballos's testimony generally stopped short of his own conclusions. After the hearing, the trial judge denied the motion to suppress, explaining that he found grounds independent of the challenged material sufficient to show probable cause for the warrant.

Ceballos says that over the next six months his supervisors retaliated against him[14] not only for his written re-

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Anderson v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986).

[14]Sunstedt demoted Ceballos to a trial deputy; his only murder case was reassigned to a junior colleague with no experience in homicide matters, and no new murder cases were assigned to him; then-District Attorney Gil Garcetti, relying in part on Sunstedt's recommendation, denied Ceballos a promotion; finally, Sunstedt and Najera transferred him to the Office's El Monte Branch, requiring longer commuting.

ports, see *ante*, at 3, but also for his spoken statements to them and his hearing testimony in the pending criminal case. While an internal grievance filed by Ceballos challenging these actions was pending, Ceballos spoke at a meeting of the Mexican-American Bar Association about misconduct of the Sheriff's Department in the criminal case, the lack of any policy at the District Attorney's Office for handling allegations of police misconduct, and the retaliatory acts he ascribed to his supervisors. Two days later, the office dismissed Ceballos's grievance, a result he attributes in part to his Bar Association speech.

Ceballos's action against petitioners under 42 U. S. C. §1983 claims that the individuals retaliated against him for exercising his First Amendment rights in submitting the memorandum, discussing the matter with Najera and Sunstedt, testifying truthfully at the hearing, and speaking at the bar meeting.[15] As I mentioned, the Court of

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Before transferring Ceballos, Najera offered him a choice between transferring and remaining at the Pomona Branch prosecuting misdemeanors instead of felonies. When Ceballos refused to choose, Najera transferred him.

[15]The county petitioners' position on these claims is difficult to follow or, at least, puzzling. In their motion for summary judgment, they denied that any of their actions was responsive to Ceballos's criticism of the sheriff's affidavit. *E.g.*, App. 159–160, 170–172 (maintaining that Ceballos was transferred to the El Monte Branch because of the decreased workload in the Pomona Branch and because he was next in a rotation to go there to serve as a "filing deputy"); *id.*, at 160, 172–173 (contending that Ceballos's murder case was reassigned to a junior colleague to give that attorney murder trial experience before he was transferred to the Juvenile Division of the District Attorney's Office); *id.*, at 161–162, 173–174 (arguing that Ceballos was denied a promotion by Garcetti despite Sunstedt's stellar review of Ceballos, when Garcetti was unaware of the matter in *People* v. *Cushey*, the criminal case for which Ceballos wrote the pertinent disposition memorandum). Their reply to Ceballos's opposition to summary judgment, however, shows that petitioners argued for a *Pickering* assessment (for want of a holding that Ceballos was categorically disentitled to any First Amendment protection) giving great weight in their favor to workplace

Appeals saw no need to address the protection afforded to Ceballos's statements other than the disposition memorandum, which it thought was protected under the *Pickering* test. Upon remand, it will be open to the Court of Appeals to consider the application of *Pickering* to any retaliation shown for other statements; not all of those statements would have been made pursuant to official duties in any obvious sense, and the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process.

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disharmony and distrust caused by Ceballos's actions. *E.g.*, App. 477–478.

SUPREME COURT OF THE UNITED STATES

No. 04–473

GIL GARCETTI, ET AL., PETITIONERS *v.* RICHARD CEBALLOS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 30, 2006]

JUSTICE BREYER, dissenting.

This case asks whether the First Amendment protects public employees when they engage in speech that both (1) involves matters of public concern and (2) takes place in the ordinary course of performing the duties of a government job. I write separately to explain why I cannot fully accept either the Court's or JUSTICE SOUTER's answer to the question presented.

I

I begin with what I believe is common ground:

(1) Because virtually all human interaction takes place through speech, the First Amendment cannot offer all speech the same degree of protection. Rather, judges must apply different protective presumptions in different contexts, scrutinizing government's speech-related restrictions differently depending upon the general category of activity. Compare, *e.g.*, *Burson* v. *Freeman*, 504 U. S. 191 (1992) (plurality opinion), (political speech), with *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980) (commercial speech), and *Rust* v. *Sullivan*, 500 U. S. 173 (1991) (government speech).

(2) Where the speech of government employees is at issue, the First Amendment offers protection only where the offer of protection itself will not unduly interfere with

legitimate governmental interests, such as the interest in efficient administration. That is because the government, like any employer, must have adequate authority to direct the activities of its employees. That is also because efficient administration of legislatively authorized programs reflects the constitutional need effectively to implement the public's democratically determined will.

(3) Consequently, where a government employee speaks "as an employee upon matters only of personal interest," the First Amendment does not offer protection. *Connick* v. *Myers*, 461 U. S. 138, 147 (1983). Where the employee speaks "as a citizen . . . upon matters of public concern," the First Amendment offers protection but only where the speech survives a screening test. *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968). That test, called, in legal shorthand, "*Pickering* balancing," requires a judge to "balance . . . the interests" of the employee "in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.* See also *Connick*, *supra*, at 142.

(4) Our prior cases do not decide what screening test a judge should apply in the circumstances before us, namely when the government employee both speaks upon a matter of public concern and does so in the course of his ordinary duties as a government employee.

II

The majority answers the question by holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Ante*, at 9. In a word, the majority says, "never." That word, in my view, is too absolute.

Like the majority, I understand the need to "affor[d] government employers sufficient discretion to manage their operations." *Ante*, at 11. And I agree that the Constitution does not seek to "displac[e] . . . managerial discretion by judicial supervision." *Ibid.* Nonetheless, there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards seem readily available—to the point where the majority's fears of department management by lawsuit are misplaced. In such an instance, I believe that courts should apply the *Pickering* standard, even though the government employee speaks upon matters of public concern in the course of his ordinary duties.

This is such a case. The respondent, a government lawyer, complained of retaliation, in part, on the basis of speech contained in his disposition memorandum that he says fell within the scope of his obligations under *Brady* v. *Maryland*, 373 U. S. 83 (1963). The facts present two special circumstances that together justify First Amendment review.

First, the speech at issue is professional speech—the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished. Cf. *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 544 (2001) ("Restricting LSC [Legal Services Corporation] attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys"). See also *Polk County* v. *Dodson*, 454 U. S. 312, 321 (1981) ("[A] public defender is not amenable to administrative direction in the same sense as other employees of the State"). See generally Post, Subsidized Speech, 106 Yale L. J. 151, 172 (1996)

("[P]rofessionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards"). The objective specificity and public availability of the profession's canons also help to diminish the risk that the courts will improperly interfere with the government's necessary authority to manage its work.

Second, the Constitution itself here imposes speech obligations upon the government's professional employee. A prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession. *Kyles* v. *Whitley*, 514 U. S. 419, 437 (1995); *Brady*, *supra*. So, for example, might a prison doctor have a similar constitutionally related professional obligation to communicate with superiors about seriously unsafe or unsanitary conditions in the cellblock. Cf. *Farmer* v. *Brennan*, 511 U. S. 825, 832 (1994). There may well be other examples.

Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished and administrable standards are quite likely available. Hence, I would find that the Constitution mandates special protection of employee speech in such circumstances. Thus I would apply the *Pickering* balancing test here.

III

While I agree with much of JUSTICE SOUTER's analysis, I believe that the constitutional standard he enunciates fails to give sufficient weight to the serious managerial and administrative concerns that the majority describes. The standard would instruct courts to apply *Pickering* balancing in all cases, but says that the government

should prevail unless the employee (1) "speaks on a matter of unusual importance," and (2) "satisfies high standards of responsibility in the way he does it." *Ante*, at 8 (dissenting opinion). JUSTICE SOUTER adds that "only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor." *Id.*, at 9.

There are, however, far too many issues of public concern, even if defined as "matters of unusual importance," for the screen to screen out very much. Government administration typically involves matters of public concern. Why else would government be involved? And "public issues," indeed, matters of "unusual importance," are often daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public's health, safety, and the environment. This aspect of JUSTICE SOUTER's "adjustment" of "the basic *Pickering* balancing scheme" is similar to the Court's present insistence that speech be of "legitimate news interest", *ibid.*, when the employee speaks only as a private citizen. See *San Diego* v. *Roe*, 543 U. S. 77, 83–84 (2004) *(per curiam)*. It gives no extra weight to the government's augmented need to direct speech that is an ordinary part of the employee's job-related duties.

Moreover, the speech of vast numbers of public employees deals with wrongdoing, health, safety, and honesty: for example, police officers, firefighters, environmental protection agents, building inspectors, hospital workers, bank regulators, and so on. Indeed, this categorization could encompass speech by an employee performing almost any public function, except perhaps setting electricity rates. Nor do these categories bear any obvious relation to the constitutional importance of protecting the job-related speech at issue.

The underlying problem with this breadth of coverage is that the standard (despite predictions that the govern-

ment is likely to *prevail* in the balance unless the speech concerns "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety," *ante*, at 9), does not avoid the judicial need to *undertake the balance* in the first place. And this form of judicial activity—the ability of a dissatisfied employee to file a complaint, engage in discovery, and insist that the court undertake a balancing of interests—itself may interfere unreasonably with both the managerial function (the ability of the employer to control the way in which an employee performs his basic job) and with the use of other grievance-resolution mechanisms, such as arbitration, civil service review boards, and whistle-blower remedies, for which employees and employers may have bargained or which legislatures may have enacted.

At the same time, the list of categories substantially overlaps areas where the law already provides nonconstitutional protection through whistle-blower statutes and the like. See *ante*, at 13 (majority opinion); *ante*, at 13–15 (SOUTER, J., dissenting). That overlap diminishes the need for a constitutional forum and also means that adoption of the test would authorize federal Constitution-based legal actions that threaten to upset the legislatively struck (or administratively struck) balance that those statutes (or administrative procedures) embody.

IV

I conclude that the First Amendment sometimes does authorize judicial actions based upon a government employee's speech that both (1) involves a matter of public concern and also (2) takes place in the course of ordinary job-related duties. But it does so only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs. In my view, these conditions are met in this case and *Pickering* balancing is consequently appropriate.

With respect, I dissent.